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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

GLEN M. CLARKE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–5a) is reported at 590 F.2d 765. The opinion of the district court (App. D, *infra*, 8a–10a) is unreported. The opinion of the court of appeals on a previous appeal (App. E, *infra*, 11a–15a) is reported at 529 F.2d 984. The district court's prior opinion (App. F, *infra*, 16a–21a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 6a) was entered on January 15, 1979.[1] By order of April 10, 1979, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including May 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 25 U.S.C. 357 authorizes a state or local government to "condemn" allotted Indian trust lands by physical occupation.

[1] On February 26, 1979, the court of appeals denied Anchorage's petition for rehearing, which did not address the propriety of the court's ruling on the question whether a State may take allotted lands by physical occupation (App. C, *infra*, 7a).

STATUTES INVOLVED

Section 3 of the Indian Appropriation Act of March 3, 1901, 31 Stat. 1084, 25 U.S.C. 357, provides in pertinent part:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

The Act of June 30, 1932, 47 Stat. 474, 25 U.S.C. 409a, provides in pertinent part:

> That whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is sold to any State, county, or municipality for public-improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation or other proceedings for such public purposes, or is sold under existing law to any other person or corporation for other purposes, the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected and purchased shall be restricted as to alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance.

The Act of July 18, 1966, 80 Stat. 304, 28 U.S.C. 2415, provides, in pertinent part:

§ 2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment. *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued. *Provided further*, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection

(g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed more than eleven years after the right of action accrued or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with

subsection (g) may be brought within eleven years after the right of action accrues.

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

* * * * *

(f) The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

STATEMENT

The United States brought this action in the United States District Court for the District of Alaska seeking injunctive relief for an alleged trespass on allotted Indian lands to which the United States holds title as trustee, and seeking also compensatory and punitive damages for the alleged trespass. The land in question is located in the Chugach Mountains, southeast of Anchorage (App.

E, *infra*, 12a). It is allotted to Bertha Mae Tabbytite, an Indian, who intervened in this action as a plaintiff (App. E, *infra*, 12a–13a).[2] The defendants are Glen Clarke, the adjoining property owner who in 1958 constructed a road over Tabbytite's allotment, Clarke's numerous subsequent grantees,[3] and the City of Glen Alps, which took over maintenance of the road in 1961 following its incorporation. The United States brought this action as trustee to close the road after the failure of Tabbytite's efforts, over a period of more than 10 years, to stop trespassers by posting no-trespass signs and blocking the roadway (App. E, *infra*, 13a).

Clarke, his grantees, and the City of Glen Alps defended on the ground that the road was an easement of necessity.[4] The district court accepted this contention and denied injunctive relief, though it awarded Tabbytite $3,500 for past and future trespass damages (App. F, *infra*, 18a–21a). On appeal, the Ninth Circuit reversed, holding that the road was not a way of necessity

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[2] In 1956 Tabbytite filed a homestead application for this land with the Department of the Interior (App. E, *infra*, 12a). Defendant Clarke applied for a homestead on an adjoining parcel in June 1958, and he constructed the road across Tabbytite's land in the late summer of that year (*ibid.*). Clarke and his wife then filed a series of contests within the Department of the Interior challenging Tabbytite's homestead entry (*ibid.*). Although these contests were unsuccessful, they so delayed Tabbytite's homestead patent that in 1966 she elected to abandon her homestead application and take the land as an Indian trust allotment (App. E, *infra*, 12a–13a).

[3] Clark subdivided his property into 40 parcels (App. F, *infra*, 17a).

[4] In the alternative, Glen Alps requested permission to file a condemnation action as a counterclaim. The district court denied this request as moot when it ruled in favor of Clarke and Glen Alps on plaintiffs' motion for injunctive relief (App. F, *infra*, 20a).

because the alleged necessity did not exist when the common grantor—the United States—conveyed the land to Tabbytite (App. E, *infra*, 13a–14a).

On remand, the Municipality of Anchorage, which annexed Glen Alps in September of 1975, contended that the establishment and maintenance of the road, first by Glen Alps and then by Anchorage, constituted a valid exercise of the power of eminent domain under Alaska law, and that the roadway had thus been "condemned" within the authority granted by 25 U.S.C. 357. The district court ruled that Glen Alps, as a third-class city, did not have the power of eminent domain under Alaska law. The court held, however, that the Municipality of Anchorage, a home-rule city, did have the power of eminent domain, and that its maintenance of the road across Tabbytite's property constituted a valid exercise of that power and a condemnation authorized by 25 U.S.C. 357 (App. D, *infra*, 9a–10a). The court concluded that Tabbytite was "relegated to her action for damages from the inverse condemnation" and for the trespass prior to Glen Alps' merger with Anchorage, and accordingly it refused to enjoin the use of the road (App. D, *infra*, 10a).

On appeal, the Ninth Circuit affirmed (App. A, *infra*, 1a–5a), rejecting the government's contention that 25 U.S.C. 357 authorizes a state to take allotted Indian lands only by judicial proceedings, not by physical seizure. The court stated the issue as "whether or not the statute extends to takings by inverse condemnation as well as by the affirmative exercise of the eminent domain power," and held that Section 357 "permits a state to take the Indian land by paying compensation in an inverse condemnation action" (App. A, *infra*, 2a). The court reasoned that the property had already been

taken, and that "it seems a contradiction to deny Indian beneficial owners a cause of action for damages under the guise of protecting their rights" (App. A, *infra*, 3a–4a). The court said Congress had directed "that the taking of trust lands for public use is to be governed by the laws of the state in which the property is found," and it saw "no reason to ignore this mandate simply because the taking is reviewed in an inverse condemnation action rather than by a direct condemnation suit" (App. A, *infra*, 5a).

ARGUMENT

The court of appeals' decision that 25 U.S.C. 357 permits state and local governments to take allotted Indian lands—to which the United States retains legal title—by physical occupation, without judicial proceedings, is without precedent in the nearly 80 years since the enactment of Section 357. It is inconsistent with the purpose of the Act as interpreted by this Court and with its language, especially as understood at the time of its enactment. If this decision is permitted to stand, it will have serious consequences for Indian allottees, who are likely to receive a good deal less for their land through compensation for physical takings as of the date of the initial occupation than they would through formal condemnation proceedings. The decision will also have serious consequences for the United States, which holds an estimated 12 million acres of allotted land in trust.[5] In

[5] The most recent estimate was made from data compiled in 1959 and reported in the "Indian Heirship Land Survey", 86th Cong., 2d Sess. IX (Comm. Print 1960), which states that the Secretary then held 12,235,411 acres of land in trust. Although fee patents have occasionally been issued for allotted trust lands, the Department of the Interior informs us that the total has not changed significantly since 1959.

addition, the court of appeals' decision will affect a large number of cases that the United States anticipates filing in the next year before the applicable statute of limitations runs out. This Court should review the court of appeals' decision and reverse it.[6]

1. Section 357, which was enacted as Section 3 of the Indian Appropriation Act of March 3, 1901, permits allotted Indian lands to be "condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned * * *." Although the statutory language states no such limitations, this Court held in *Minnesota* v. *United States*, 305 U.S. 382 (1939), in a unanimous opinion by Mr. Justice Brandeis, that the

[6] Although the court of appeals remanded the case to the district court for a determination of "the date and extent of the taking and the operation of the applicable statute of limitations" (App. A, *infra*, 5a), there is no reason for review by this Court to be deferred. The district court's decision on remand will neither affect the rule of law announced by the court of appeals nor shed any significant light on it. The action here was indisputably brought before the running of the applicable statute of limitations (see n. 15, *infra*). The date of the taking by Anchorage (which the court of appeals assumed to be the relevant date, see note 15, *infra*), is September 1975, when Anchorage annexed Glen Alps and took over the road. All that remains to be determined is the "extent of the taking," *i.e.*, the value of the highway easement across Tabbytite's land at that time. The court of appeals' determination that the United States may not maintain an action for injunctive relief, but is relegated to seeking damages for a taking, is an important and clearcut ruling that controls the further conduct of this case and will be governing law of the Ninth Circuit, within which a very large proportion of the allotted trust lands lie. As such it warrants review by this Court now. See, *e.g.*, *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152–154 (1964); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945).

Act does not authorize suit in a state court and that the United States is an indispensable party defendant to any suit brought in a federal court.[7]

In contrast, the present decision of the court of appeals requires no judicial proceeding at all. The decision allows a state or local government to "condemn" allotted lands under the Act by simply occupying them. There is no requirement "that the state should have filed an eminent domain action prior to the taking" (App. A, *infra*, 3a). Rather, "once the taking has been accomplished by the state" *(ibid.)*, the burden is on the United States and the allottee to sue the state for damages. Where this Court in *Minnesota* v. *United States* found "persuasive reasons why that statute should not be construed as authorizing suit in a state court" (305 U.S. at 389), the court of appeals has construed the statute to authorize a state or local government to take allotted lands without bringing suit in any court.[8]

[7] The Court noted that, in the case of Indian land held in fee with restraints on alienation, "it is established that an alienation of the Indian's interest in the lands by judicial decision in a suit to which the United States is not a party has no binding effect but that the United States may sue to cancel the judgment and set aside the conveyance made pursuant thereto." Thus, "[i]n the stronger case of a trust allotment, it would seem clear that no effective relief can be given in a proceeding to which the United States is not a party and that the United States is therefore an indispensable party to any suit to establish or acquire an interest in the lands." *Id.* at 386 n. 1.

[8] The court consistently frames the question as whether the United States and the Indian allottee should be *permitted* to bring an action to recover damages for the taking of the allotted land. App. A, *infra*, 3a, 4a, 5a. But the United States and Tabbytite are seeking to bring no such action; they are seeking to enjoin the defendants from occupying the land unless the defendants bring a judicial condemnation proceeding. The question is whether the United States and the allottee are legally helpless to prevent the physical taking and *must* bring an action for damages as their only remedy after the taking has been accomplished.

2. By its terms, Section 357 does not authorize any and all takings of Indian lands, including those accomplished by physical seizure; it provides only that Indian lands may be "condemned" under the laws of the State or Territory where they are located. Whatever may be the current vogue of the term "inverse condemnation," we are aware of no evidence that it had yet been coined in 1901, when Section 357 was enacted—much less that the 56th Congress intended to reflect it in the statutory language. "Condemnation" meant then, as it generally still means today, a judicial proceeding brought by the governmental entity seeking to take the land.[9]

Nothing in the sparse legislative history of Section 357, which was adopted as a floor amendment during the Senate debates,[10] suggests that Congress intended the provision to apply to takings by seizure, rather than by formal condemnation proceedings. Accordingly, the Secretary of the Interior, in a regulation quoted and relied on by this Court in *Minnesota* v. *United States*, *supra*, 305 U.S. at 390 n.7, has interpreted Section 357 as authorizing a taking only by "condemnation suits" in federal court.[11] And as recently as 1970, after the phrase "inverse condemnation" had come into usage, the Congress still used the term "condemnation" to refer only to eminent domain proceedings brought *by* the government; it did not use "condemnation" or "inverse condemnation" to refer to actions brought *against* the government to recover just compensation for the taking of property.[12]

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[9] The contemporary usage is evidenced by this Court's opinions in *United States* v. *Lynah*, 188 U.S. 445 (1903). The Court there held that the federal government's permanent flooding of the plaintiffs' land constituted a "taking" for which damages could be recovered under the Fifth Amendment, but none of the Court's opinions used the word "condemnation" to refer to this taking. On the contrary, the Court's usage consistently distinguished such a "taking" from a "condemnation" proceeding. See *id.* at 462, 467, 468; see also *id.* at 478 (Brown, J., concurring). For usage by this Court in 1947 adhering to the same distinction, see *United States* v. *Dickinson*, 331 U.S. 745, 747–748, 749 (1947).

[10] 34 Cong. Rec. 1448 (1901).

[11] See Regulation 69 1/2 of the Regulations of the Department of the Interior, "Concerning Rights of Way over Indian Lands," 3 Fed. Reg. 985 (1938), which provides:

> As the holder of the legal title to allotted Indian lands held in trust, the United States must be made a party to all such condemnation suits and the action must be brought in the applicable Federal District Court, the *procedure*, however, to follow the provisions of State law on the subject, so far as applicable.

[12] In the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, Congress provided separately for the awarding of litigation expenses to landowners in "a proceeding instituted by a Federal agency to acquire real property by condemnation" (42 U.S.C. 4654 (a)) on the one hand, and in proceedings involving "[c]laims against the United States" (42 U.S.C. 4654 (c)) on the other, describing the latter as proceedings "brought under section 1346(a)(2) or 1491 of title 28, awarding compensation for the taking of property by a Federal agency * * *" (42 U.S.C. 4654(c)). Congress did not refer to the latter proceedings as "inverse condemnation" or "condemnation," and it did not treat them as the functional equivalent of a condemnation action. On the contrary, the congressional policy in Section 4654 seeks to deter the federal government from taking property without instituting condemnation proceedings. Thus, Section 4654(a) provides for the award of costs and attorneys' fees to the landowner in a condemnation proceeding only if the proceeding is abandoned by the United States or if the final judgment is that the federal agency cannot acquire the property, whereas under Section 4654(c) the landowner who is forced to sue for damages for a taking of property by the federal government is routinely entitled to the award of costs and attorneys' fees.

The court of appeals erroneously assumed that a taking by physical seizure was within the reach of Section 357 because it was an "inverse condemnation" permitted by state law. But "inverse condemnation"—that is, taking by seizure or occupation, with the burden placed on the landowner to sue for just compensation—is not a procedure established (or mentioned) by the Alaska statutes governing the power of eminent domain.[13] The phrase "inverse condemnation" is simply a popular description of an action brought by a property owner seeking just compensation for land taken by the government where it appears that the government will not institute condemnation proceedings. See, *e.g.*, *Martin* v. *Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540, 542 n.1 (1964) (en banc), cert. denied, 379 U.S. 989 (1965); *City of Jacksonville* v. *Schumann*, 167 So. 2d 95, 98 (Fla. App. 1964). To say that Alaska law provides for inverse condemnation is to say nothing more than that the Alaska courts enforce the constitutional requirement of just compensation for the taking of property. See *State, Department of Highways* v. *Crosby*, 410 P. 2d 724, 728-729 (Alaska 1966); *Wickwire* v. *City & Borough of Juneau*, 557 P.2d 783, 784 (Alaska 1976).

Significantly, the term "inverse condemnation" refers to the legal action brought against the state to recover compensation (see 6A *Nichols Eminent Domain* § 28.3 (3d ed. 1976))—not to the physical action *of* the state in taking the property. Thus it is not a procedure which the state may choose as an alternative to the institution of a

[13] See Alaska Stat. §§ 09.55.240-09.55.460 (1973).

condemnation proceeding—at least not for the purpose of "condemning" Indian land under 25 U.S.C. 357.[14]

3. The court of appeals erroneously assumed that a refusal to recognize "inverse condemnations" under Section 357 would work to the detriment of allottees, "deny[ing] Indian beneficial owners a cause of action for damages under the guise of protecting their rights" (App. A, *infra*, 4a). The opposite is true. Prior to the decision of the court of appeals, allottees were not deprived of "a cause of action for damages." The United States, as trustee, could bring an action on their behalf for damages for trespass (as it did in this case), as well as for injunctive relief. The court's decision has the injurious effect of depriving the allottee (and the United States as trustee) of the right to sue a state or its subdivision for injunctive relief. It will also have the effect, in many cases, of reducing the award to the allottee, often to the point where it will be insufficient to enable the purchase of similar lands in accordance with congressional policy.

[14] The decision of the court of appeals, with its broad endorsement of "inverse condemnation" as a legitimate alternative to formal condemnation proceedings, may have an impact not limited to the taking of Indian lands. It may encourage governmental entities to dispense with legal proceedings, and place on the landowner the onus of bringing the legal action, in the taking of property generally. Cf. *United States* v. *Dickinson*, 331 U.S. 745, 747-749 (1947). So far as the eminent domain power of the federal government is concerned, Congress has sought to deter such a course through the litigation-expense provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4654 (see note 12, *supra*). In view of that congressional policy, it would be anomalous to construe 25 U.S.C. 357 as allowing state and local governments to use nonjudicial takings with impunity against Indian lands to which title is held by the United States.

The facts of this case illustrate the latter point. Respondents claim that the taking occurred either in 1961, when Glen Alps began to maintain the road across Tabbytite's land, or (if the district court is correct in its conclusion that Glen Alps lacked the power of eminent domain) in 1975, when Anchorage annexed Glen Alps and took over the road's maintenance. Under respondents' theory, Tabbytite is entitled to an award for the value of her land at the time one city or the other took possession. *United States* v. *Dow*, 375 U.S. 17, 21–22 (1958). Given the escalation of real estate values, an award for the 1961 or 1975 value of Tabbytite's property—which is located in a rapidly developing area on the outskirts of Anchorage—will be (even with interest) only a fraction of the property's present value, which would be the measure of just compensation if formal condemnation proceedings were instituted today.

Nor is this situation uncommon. If takings-by-occupation of Indian lands are allowed, there will frequently be significant delays between the initial occupation and the ultimate legal proceeding, and hence significant discrepancies in the compensation recoverable. The United States and the allottee may be unaware of the encroachment when it first occurs, or the allottee may be trying, as Tabbytite was, to stop what he views as a trespass. And delays may continue even after suit is filed. Any legal issue, such as the question here of whether a particular entity has the power of eminent domain under state law, may further delay the ultimate award to the allottee, with the consequence of decreasing its real value.

The net result in a case such as this, where the roadway has already been in place for more than 20 years, is

that the ultimate award to the allottee, based on the value at the time the state or local government took possession, will be only a fraction of the current cost of equivalent land. The consequence is that the policy of the Act of June 30, 1932, 25 U.S.C. 409a—which authorizes the Secretary to reinvest the allottee's condemnation award in other lands—will be frustrated, since it will not be possible to purchase equivalent lands for the amount of the award. See *Minnesota* v. *United States*, *supra*, 305 U.S. at 388 & n.4.

4. The court of appeals' decision imposes a substantial burden on the United States, as trustee, to discover and challenge action that may constitute a taking of allotted lands. The court dismissed the government's concern on this score with the comment (App. A, *infra*, 5a) that "if an intrusion is of such severity that it constitutes an inverse taking the matter will come to the attention of the Indian allottee and the Government." The court's assumption is incorrect. As we have noted (*supra*, page 9), there are approximately 12 million acres of allotted trust lands. This Court has recognized the " 'almost staggering problem' " the United States faces "in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments." *Poafpbitty* v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968), quoting H.R. Rep. No. 2503, 82d Cong., 2d Sess. 23 (1952).

Prompt discovery of all trespasses by state or local governments (or other entities with the power of eminent domain) would not be a simple matter. Many allotments are in remote areas. There is no requirement that the allottee reside on the allotted lands or make use of them. Indeed, the lands were originally surveyed by the

government and allotted to eligible Indians who, in some cases, never saw the lands and would have been unable to identify them. Moreover, the combined effect of statutory restrictions on alienation together with descent and distribution provisions has produced increasingly fractionated ownership by non-resident Indians. There will be many cases where the allottees will not be aware of an intrusion that may constitute a taking. The United States could learn of all such intrusions only by instituting a costly and time-consuming monitoring program. And there would still be problems in determining when the intrusion first occurred. Cf. *United States* v. *Dickinson*, *supra*, 331 U.S. at 748.

The difficulty of discovering possible takings is especially troubling in view of the fact that the greater the delay between the date a state takes possession and the date the allottee receives the award, the more inadequate the award will be to compensate the allottee for the present value of the land, or to enable the Secretary to purchase substitute lands to be held for the benefit of the allottee.

5. Permitting state and local governments to take allotted lands by physical seizure or occupation also presents serious problems in connection with the statute of limitations applicable to certain actions brought by the United States as trustee for Indians, 28 U.S.C. 2415, as amended by the Act of August 15, 1977, Pub. L. No. 95-103, 91 Stat. 842. The statute of limitations for all claims by the United States for money damages on behalf of Indians that accrued before 1966 will run out on April 1, 1980. 28 U.S.C. 2415, as amended by the Act of August 15, 1977, 91 Stat. 842. Accordingly, the United States anticipates that within the next year it will be

filing a large number of claims, many of which involve alleged trespasses by entities that may have the power of eminent domain under state law. Unless this Court reviews the ruling in this case, the lower courts will be without guidance on the question whether to treat these cases as trespass actions—where the allottee is entitled to damages and injunctive relief—or as "inverse condemnation" actions, where the allottee is entitled only to the value of the property at the time of the initial occupation.

While the limitation period prescribed by Section 2415(b) clearly applies to trespass claims, the limitations period that would be applicable to so-called inverse condemnation actions is by no means clear. We anticipate that state and local entities will argue that the six-year-and-90-day limit applicable to actions founded on tort or implied contract, 28 U.S.C. 2415(a) and (b), should be applied.[15] If they prevail on this point, Section 2415

[15] The present claim is clearly not time-barred, although the court of appeals remanded the case to the district court to determine "the operation of the applicable statute of limitations" (App. A, *infra*, 5a). It seems clear that under the court of appeals' theory the date of taking by Anchorage was September 16, 1975, when the unified Anchorage municipal government succeeded to the rights, liabilities, and duties of a number of smaller surrounding cities, including Glen Alps, and took over maintenance of the road over Tabbytite's property. Since the United States filed the instant suit in 1969, before the taking, the action would not be time-barred regardless what limitations period, if any, applies. Alternatively, if respondents ultimately succeed in overturning the district court's ruling (which the court of appeals did not consider; App. A, *infra*, 2a n.1) that Glen Alps lacked the power of eminent domain, then the taking occurred in 1961 when Glen Alps was incorporated and began to maintain the road. The 1969 action would still have been timely under 28 U.S.C. 2415, since, as noted above, the limitations period for pre-1966 claims has been extended to April 1, 1980.

would, in essence, create a six-year period in which the state could, by adverse possession, divest title held by the United States as trustee. That result would directly contravene Congress's intent that "no one can acquire title to Government property by adverse possession," which is expressed by the provision in Section 2415(c) that there is no limitation period for the government's "bringing an action to establish the title to, or right of possession of, real property." See S. Rep. No. 1328, 89th Cong., 2d Sess. (1966); cf. *Texas* v. *Louisiana*, 410 U.S. 702, 714 (1973). The result of the court of appeals' holding in this case that the United States as trustee is not entitled to bring a suit for possession, but is relegated to an action for damages, may be the frustration of this carefully crafted exception to the statute of limitations established in Section 2415.

A further problem may arise if the statute of limitations in Section 2415 is applied to "inverse condemnation" actions brought by the United States on behalf of an allottee. Section 2415(f) provides that there is no limitations period applicable to counterclaims by the United States. As long as state and local governments must bring condemnation actions to acquire title to allotted lands, the United States will be able to counterclaim for damages for any earlier trespass, without regard to any statute of limitations. But if state and local governments may take possession of allotted lands they wish to acquire and then wait for the allottee and the United States to discover the encroachment and bring an "inverse condemnation" action for damages, they will have a substantial financial incentive to follow this course, since the six-year limitations period may run on any damage claims by the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

STEPHEN R. BARNETT
Deputy Solicitor General

SARA SUN BEALE
Assistant to the Solicitor General

CARL STRASS
Attorney

MAY 1979

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

GLEN M. CLARKE, et al., No. 77-2571
Appellees,

OPINION

Appeal from the United States District Court
for the District of Alaska

Before: WRIGHT, KENNEDY, and TANG, Circuit Judges.

KENNEDY, CIRCUIT JUDGE:

The United States filed this trespass suit as the owner in fee title of property held in trust after its patent to an Indian by allotment. *See* U.S.C. §§ 331–332. A complete background of the case is set forth in our earlier opinion, *United States v. Clarke*, 529 F.2d 984 (9th Cir. 1976). The dispute concerns a road that was built on property of the Indian owner by a private party. The private owner's interest in the road later was transferred to a political subdivision of the State of Alaska.

In this phase of the proceedings, the United States sought an injunction against use of the road, claiming

that the State of Alaska or a political subdivision may not acquire an interest in Indian lands held in trust except by eminent domain and that an injunction should be granted until eminent domain proceedings are commenced. The trial court denied the injunction, reasoning that the land had been the subject of an inverse taking and that the public has the right to use the road after its acquisition by this means, the property owner being limited to an action for compensation resulting from inverse condemnation. The court granted partial summary judgment and denied injunctive relief, and the latter ruling is the subject of this appeal.[1]

A state is allowed by federal statute to take Indian land by condemnation, 25 U.S.C. § 357. The sole issue on appeal is whether or not the statute extends to takings by inverse condemnation as well as by the affirmative exercise of the eminent domain power. We agree with the district court that the statute permits a state to take the Indian land by paying compensation in an inverse condemnation action.

The statute in question provides: "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damaged shall be paid to the allottee." The argument of the Government that the statute does not include inverse takings is based princiaplly on *Minnesota v. United States*, 305 U.S. 382 (1939). There the Supreme Court held that the United

[1]The appellees seek review of the district court's denial of an earlier motion for partial summary judgment. Assuming the order was an appealable one, a timely notice of appeal was not filed. Therefore, the propriety of this order will not be addressed.

States is an indispensable party in state actions to condemn any trust property and that such actions must be brought exclusively in the federal courts. We think that case is simply inapposite to the issue before us. There was no occasion there for the Court to consider the propriety of inverse condemnation suits, since the eminent domain action was instituted by the state. The reason for requiring the condemnation suit to be heard in a federal court is irrelevant to whether the United States may, on behalf of the Indian owner, maintain an inverse condemnation action. The Court noted that Indian land under trust allotment is a subject within the exclusive control of the federal government, and that "the judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts." *Id.* at 389 (footnote omitted). Whether the proceeding is for inverse condemnation or for eminent domain, the federal court may maintain control over the action to comply with the policies of *Minnesota*.

We think once the taking has been accomplished by the state it serves little purpose to interpret the statute to refuse to permit an inverse condemnation suit to be maintained on the grounds that the state should have filed an eminent domain action prior to the taking. As the Alaska Supreme Court noted in an analogous situation:

> The property has already been taken. It would serve no useful purpose to insist now that the state must initiate a condemnation action and take the initial steps required by law and rule as a condition to the exercise of its power of eminent domain. What is at issue here is the matter of awarding appellees just compensation. Such compensation may be de-

termined in this proceeding, utilizing so far as practicable the statutory requirements and procedural steps relating to the condemnation action, as well as it could be determined in a separate condemnation action to be instituted by the state. Since the evident purpose of the injunction was to require the state, if it chose to utilize appellees' property, to institute a separate condemnation action to acquire such property, and since we have held that such action is unnecessary, the injunction was not appropriate and should be dissolved.

Department of Highways v. Crosby, 410 P.2d 724, 729 (Alaska 1966).

The Government argues that the statute permitting condemnation should be limited to direct condemnation to avoid clouding title to trust lands, thus increasing protection for Indian allottees. It suggests that such clouding will occur any time the state or a political subdivision trespasses upon the property as, such as in this case, by building a road across it. We do not think this is a persuasive reason for accepting such limited interpretation of the statute. To us it seems a contradiction to deny Indian beneficial owners a cause of action for damages under the guise of protecting their rights. Allowing inverse condemnation suits will encourage states and political subdivisions to act with more circumspection, not less, when governmental activities conflict with ownership rights of Indian trust lands. And our holding certainly does not prevent the United States and the allottee from seeking immediate relief from unlawful intrusions upon land, whether the intrusion is done by trespass of a private or public entity.

The United States further contends that our holding will require it to make frequent and expensive inspections of these lands for possible acts of inverse condemnation. We think, however, that if an intrusion is of such severity that it constitutes an inverse taking the matter will come to the attention of the Indian allottee and the Government.

Congress has declared that the taking of trust lands for public use is to be governed by the laws of the state in which the property is found. We see no reason to ignore this mandate simply because the taking is reviewed in an inverse condemnation action rather than by a direct condemnation suit.

There appear to be unresolved questions in this case, including, among others, the date and extent of the taking and the operation of the applicable statute of limitations. These matters remain before the lower court. We hold only that section 357 of 25 U.S.C. does not preclude actions against states or their political subdivisions, according to the law of the state, for inverse condemnation. Accordingly, it does not appear that the plaintiff will prevail in its prayer for injunctive relief and the district court was correct to deny the injunction pending the suit.

The order denying the injunction is affirmed and the case is remanded for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant

v.

GLEN M. CLARKE, ET AL.,
Appellees

DC# A-69-69
No. 77-2571
No. 77-3469

January 15, 1979.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the District of Alaska and was duly submitted. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and hereby is affirmed and the case is remanded for further proceedings.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

GLEN M. CLARK, et al.,
Appellees,

No. 77-2571

OPINION

Appeal from the United States District Court for the District of Alaska

Before: WRIGHT, KENNEDY, and TANG, Circuit Judges.

The petition for rehearing is DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,

BERTHA MAE TABBYTITE,
Intervenor,

No. A-69-69

GLEN M. CLARKE, et al,
Defendants.

CIVIL

MEMORANDUM AND ORDER

THIS CAUSE comes before the court on the Municipality's second motion for partial summary judgment. The issue presented is whether the use of plaintiff's land without the benefit of formal condemnation proceedings is proper under the theory of inverse condemnation to comport with 25 U.S.C. §357. As the court holds that such a condemnation sufficiently fulfills the mandate of that statute it need not reach several other issues raised by the motions.

The facts of the case show that the Municipality of Anchorage as successor in interest to the City of Glen Alps has used a portion of the plaintiff's land for public purposes. This use has taken place without the benefit of formal condemnation proceedings. The plaintiff seeks, *inter alia*, an injunction which will prohibit such use

until a formal condemnation has occurred. The Municipality asserts that plaintiff's right to sue for inverse condemnation precludes such an injunction.

The court first turns to the statutory authority for the Municipality's claim of inverse condemnation. 25 U.S.C. §357 states:

> "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned. . . . ."

The Municipality contends that a taking without formal condemnation proceedings is a proper condemnation in Alaska and may be utilized under this statute. It is clear from the wording of the statute that state law is to govern the propriety of the condemnation proceedings. *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614, 617 (9th Cir. 1959). Under Alaska law the acts of the Municipality were in the nature of inverse condemnation. *State, Department of Highways v. Crosby*, 410 P.2d 724, 728–29 (1966). It is well settled in Alaska that a taking under such circumstances is a proper exercise of the power of eminent domain and that only the failure to provide just compensation is unlawful. *Id.* at 728, *see also* 6A, *Nichols on Eminent Domain*, §28.3, p. 28–84. The remedy of an injunction, therefore, is barred as the suit for damages is exclusive. *Id.* at 728–29; *Wickwire v. Juneau*, Ak. Sup. Ct. Slip op. at 3 (December 6, 1976); *see also Nichols, supra* at 28-85. Such a construction is consistant with the apparent intent of this statute which puts Indian lands on the same footing as other lands with respect to condemnation proceedings.

The plaintiff's assertion that *Minnesota v. United States*, 305 U.S. 32 (1939) requires a formal condemna-

tion proceeding is not well taken. The issue in that case was a narrow jurisdictional question and the rationale is not applicable to the present action.

Although the plaintiff is relegated to her action for damages from the inverse condemnation she is also entitled to her common law trespass damages for the use of the land prior to unification. *Cf. Nichols, supra*, at 28–74 & 28–80.

Accordingly, IT IS ORDERED.

THAT defendant's motion for partial summary judgment is granted.

DATED at Anchorage, Alaska, this 7th day of April, 1977.

JAMES A. VON DER HEYDT
United States District Judge

cc: United States Attorney
Municipal Attorney
Bertha Mae Tabbytite, Vincent Vitale
Randall E. Farleigh
J.L. McCarrey, Jr.
Albert Maffei
Croft, Thurlow and Loutrel
Hughes, Thorsness, Gantz, Powell & Brundin

APPENDIX E

529 FEDERAL REPORTER, 2d SERIES

UNITED STATES of America,
Plaintiff-Appelant,

and

Bertha Mae Tabbytite,
Plaintiff-Intervenor,

v.

Glen M. CLARKE, et al.,
Defendants-Appellees.

No. 74-1659

United States Court of Appeals,
Ninth Circuit

Feb. 4, 1976.

OPINION

Before DUNIWAY, TRASK and SNEED, Circuit Judges.

DUNIWAY, Circuit Judge:

The United States, joined by Bertha Mae Tabbytite as an intervenor, brought suit to enjoin the defendant class from trespassing on land patented to Tabbytite, an Indian, under 25 U.S.C. §§ 331–32 as an Indian trust allotment, and to recover compensatory and punitive damages for trespass upon that land from 1958 through 1969.

The district court denied an injunction, finding that the defendants had an easement implied by necessity across Tabbytite's land, but awarded plaintiffs $3,500 in compensatory damages—$2,000 for past trespasses and $1,500 for prospective trespasses. The United States appeals and we reverse.

Tabbytite's 160 acres of land are located in the Chugach Mountains southeast of Anchorage, Alaska. In November, 1956, she filed a homestead application for the land with the Department of the Interior.[1] A year and a half later, in June, 1958, Glen Clark, the principal named defendant, applied for a homestead on an adjoining 80-acre parcel. To secure access to a public highway, Clarke constructed a road across Tabbytite's land in the late summer of 1958. The district court held that his doing so and using the road was a continuing trespass, for which it awarded damages. It is undisputed that Clarke never obtained a grant of an easement from anyone.

After securing his patent in 1961, Clarke subdivided his property into 40 parcels, most of which he sold before this suit commenced. Tabbytite was not as fortunate. Between 1958 and 1966, Clarke and his former wife filed three separate contests to Tabbytite's patent application. Clarke admitted at trial that he was aware of 43 U.S.C. § 185 which gives a successful contenstant a preference to the cancelled homestead. Although Tabbytite prevailed in these contests, she could not get her patent while the contests were pending. Apparently despairing of ever securing the land via the homestead route, she

[1] Tabbytite first applied for a homestead on this land in 1954. She later abandoned her application, but was permitted to refile in 1956 pursuant to 43 U.S.C. § 182 (1970).

elected to abandon her homestead application and take the land as an Indian trust allotment. However, there was no break in her possession.

During this same period Tabbytite made several attempts to bar those whom she considered trespassers from crossing her property. She posted "no trespassing" signs, and once, in 1967, sought to block the road physically. On this occasion, Clarke told her that Alaska law prohibited the blocking of a public highway and warned that she would be arrested if she persisted. She did not, choosing instead to notify the Bureau of Indian Affairs in Anchorage of her problem. On the advice of the Bureau, the United States, which holds legal title to Tabbytite's trust allotment, filed this action in 1969.

The substance of Clarke's[2] defense is that he has an easement of necessity across Tabbytite's land, and the trial court so held. Clarke cites *United States v. Dunn*, 9th Cir., 1973, 478 F.2d 443, for the proposition that a land patent may include such an implied easement across adjacent land still held by the federal government. *Dunn* is inapplicable here, because Tabbytite's trust allotment is not federal land and was not when Clarke applied for his homestead or when he got his patent. Her entry for purposes of homesteading in 1956 separated the land from the public domain. *Knapp v. Alexander-Edgar Lumber Co.*, 1915, 237 U.S. 162, 166–167, 35 S.Ct. 515, 59 L.Ed. 894. Legal title remained in the government, but as against all except the United States, she was vested with all the incidents of fee simple title when she entered. *United States v. Buchanan*, 1914, 232 U.S. 72,

[2] We refer only to Clarke because all other defendants are his successors in interest. If he has no implied easement, they also have none.

76-77, 34 S.Ct. 237, 58 L.Ed. 511. Clarke's claim to an easement of necessity through the public domain, even assuming it to be meritorious, cannot give him any such right against Tabbytite. *Cf.* 3 Tiffany on Real Property § 793 (3rd ed.).

In the alternative Clarke argues that he is the successor in interest of the United States, and that the United States had retained an implied easement of necessity across Tabbytite's land when she first homesteaded. This argument also must fail. The government never had an easement of necessity over Tabbytite's land.[3] She was one of the first homesteaders in the area. At the time of her entry in 1956, the land which later became Clarke's homestead was not landlocked. Rather, it was a small part of other substantial contiguous federal holdings across which the government could get access to what later became Clarke's homestead. Only after Tabbytite entered were these federal lands transferred to other homesteaders, including Clarke, and to the state of Alaska. No easement of necessity ever arose over Tabbytite's land because, when her parcel was separated from the public domain, the grantor, the United States, retained access to its remaining property, including what later became Clarke's property, across land that it still held. *Cf. Smith v. DeFreitas*, 3d Cir., 1964, 329 F.2d 629, 633–34.

Moreover, if we were to assume that the government had an easement, it never passed to Clarke. Accepting Clarke's contention that *Dunn*, *supra*, supports the

[3] We ignore 48 U.S.C. § 321d, repealed 73 Stat. 146 (1959), which reserved in all Alaska patents a right of way to the United States for public roads and highways. Clarke could have acquired no rights under this section.

principle that a patent may carry with it an implied right of way across federal land, it does not follow that Clarke succeeded to an easement across Tabbytite's trust allotment. As Clarke knew in 1961 when he received his patent, it was then as necessary to cross the land belonging to Tabbytite to reach his homestead as he now says that it is. He could have asked that any easement which his grantor, the United States, possessed be conveyed to him. He did not, and he is not now in a position to ask this court to enlarge the scope of his patent. *See Great Northern Railway Co. v. United States*, 1942, 315 U.S. 262, 272, 62 S.Ct. 529, 86 L.Ed. 836. Any inclination we might otherwise have to assist Clarke is more than counterbalanced by Clarke's highhanded behavior in attempting to take what was not his, and by the existence of Tabbytite's right to an unencumbered title to her allotment. *United States v. Wood*, 9th Cir., 1972, 466 F2d 1385, 1387–88.

As Clarke had no easement of necessity across Tabbytite's land, it follows that his successors in interest have none either.

The judgment is reversed and the case is remanded to the district court for further proceedings consistent with this opinion.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,

and

BERTHA MAE TABBYTITE,
Intervenor,

v.

GLEN M. CLARKE, et al,
Defendants.

No. A–69–69

CIVIL

MEMORANDUM AND ORDER

THIS MATTER comes before the Court on motion of plaintiff United States to reconsider the Memorandum and Order entered by the Court on August 24, 1972.

The objections of the United States are centered on the applicability of the doctrine of equitable estoppel to the facts of this matter. Since that question becomes moot as a result of this memorandum and order, the Court need not rule upon it. The Court grants the motion for reconsideration, vacates the order dated August 24, 1972, and enters the following memorandum and order which shall in all respects supercede that of August 24, 1972.

This class action involving an alleged trespass to Intervenor's land was tried to the court beginning on June 28, 1972. The conflict arose over the building of a road over a small portion of Intervenor's land which was held in trust for her by the United States as an Indian allotment. Following the close of all testimony, the Court, in the presence of counsel of the major parties, viewed the area in question.

Intervenor, an Indian, first filed a homestead entry application in 1956 on the property now held in trust for her as an Indian allotment. During the summer of 1958, defendants Clarke and Baker, at that time being husband and wife, made a homestead entry above Intervenor's land. In August 1958, defendants Clarke and Baker constructed a road through a portion of Intervenor's land in order to gain access to their own homestead. Following certain contests to Intervenor's first homestead entry, Intervenor filed a second homestead entry application. This application also was contested by defendant Clarke, or others. The result was, in 1965, that Intervenor was given her choice of pursuing the second homestead application in contest, or taking the land as an Indian allotment. Intervenor chose the latter course, and on June 2, 1966, the Indian allotment was issued.

During the years since the construction of the road, the Clarke property has been subdivided, and over 40 parcels sold and a number of homes built thereon. On June 8, 1961, an area including the Clarke property became incorporated as a third class city known as Glen Alps. Several business concerns, including Alaska Gas and Service Company, Radio Anchorage, Standard Oil Company, and the Cook Inlet Pipeline Company, have

constructed and maintain communications and other important facilities in the area. Since the construction of the road 11 years before the commencement of this action, and 14 years before trial, both the property owners in Glen Alps and the general public have utilized the road as a means of access to Glen Alps and the entire adjacent area. Testimony indicated that the business concerns noted above would have no other access other than the road in question by which to service their facilities. All private parties owning property in Glen Alps have no other reasonable access other than the road crossing intervenor's land.

It is undisputed that the roadway across Intervenor's property was constructed in August 1958, and that it has been in open and continuous use by the Glen Alps property owners and the general public since that time. Intervenor testified that, through the years, she had erected one or two "no trespassing" signs, but she readily admitted that at no time in any way did she or any person actually block passage of the road.

The United States and the Intervenor strongly urge that other access routes are available to the public, but the Court finds no convincing evidence whatsoever that this is true. In fact, the opposite is found to be true—that the route taken by Clarke at the time of road construction in 1958 was the only practical one available at reasonable cost for year-round access. In short, the Court finds the road to be a way of necessity.

Plaintiff, United States and intervenor both seek equitable relief in the form of a permanent injunction against defendants, together with an award of compensatory and punitive damages caused by the alleged trespasses.

The Court recognizes the existence of a continuing trespass on Intervenor's land. The Court further recognizes the desirability of injunctive relief to abate a continuing trespass. However, under exceptional circumstances, where the hardship suffered by the defendant in complying with injunctive relief substantially outweighs whatever benefit accrues to plaintiff by the grant of injunctive relief, the Court may elect to shape the equitable relief actually granted, and order money damages in lieu of injunctive relief. *Cox v. City of New York*, 193 N.E. 251 (N.Y. 1934). As stated in 1 Pomeroy's Equity Jurisprudence, §237e (1941):

> And in general a court of equity has jurisdiction to entertain a bill for an injunction against the commission or continuance of a wrongful act, it may award damages in substitution for such injunction, where the defendant by his acts committed subsequent to the service of process upon him has rendered relief by injunction ineffectual. Indeed, the court has gone farther in awarding damages to a plaintiff bringing a bill in good faith, when equitable relief is impossible, impracticable, or would result in undue hardship. Even though he has not prayed for such relief, the plaintiff, in exceptional circumstances, has been compelled to accept damages in lieu of an injunction.

The Court finds such to be the case here.

Therefore, IT IS ORDERED:

1. THAT plaintiff's motion for permanent injunction is denied.

2. THAT Intervenor's motion for permanent injunction is denied.

3. THAT in lieu of injunctive relief, Intervenor is awarded $2,000.00 compensatory damages for past trespasses and $1,500.00 compensatory damages for prospective trespasses.

4. THAT defendants' motion to add parties to the counterclaim is denied.

5. THAT defendant's motion to amend the counterclaim is denied.

6. THAT defendants' counterclaim in condemnation is denied as being moot.

7. THAT the counterclaim of defendant Alaska Gas and Service Company in condemnation is denied as being moot.

8. THAT all persons are permanently enjoined from blocking or in any way obstructing passage upon the roadway in question.

9. THAT all persons are permanently enjoined from altering the course of the roadway in question in any way or in widening or enlarging the same.

10. THAT normal maintenance work and snow clearance as reasonably required may be done from time to time upon the roadway in question.

11. THAT each party pay its own costs and attorney fees.

12. THAT the motion to dismiss as to the defendant Spendlove is granted.

13. THAT order dated October 19, 1972, is vacated.

14. THAT counsel for defendant Clarke forthwith prepare an appropriate judgment form.

DATED at Anchorage, Alaska, this third day of October, 1973.

JAMES A. VON DER HEYDT
United States District Judge

cc. United States Attorney
Sylvia Short
Albert Maffei
J. L. McCarrey, Jr.
Peter Lekisch
Leroy Barker
Robert Ely
Croft & Bailey
Hughes, Thorsness, Lowe, Gantz & Clark

Supreme Court, U. S.
FILED
JUL 11 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1693

UNITED STATES OF AMERICA, *Petitioner,*

v.

GLEN M. CLARKE, et al., *Respondents.*

BRIEF OF BERTHA MAE TABBYTITE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1693

UNITED STATES OF AMERICA, *Petitioner,*

v.

GLEN M. CLARKE, et al., *Respondents.*

BRIEF OF BERTHA MAE TABBYTITE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT

This action was brought by the United States seeking injunctive relief as well as damages for an alleged trespass on lands allotted to an Indian, Bertha Mae Tabbytite, to which the United States holds legal title as trustee. Tabbytite intervened as a plaintiff (Pet.App. E at 11a) and, represented by private counsel, participated in the proceedings below.

Tabbytite joins the United States in requesting that the petition for a writ of certiorari be granted. She adopts the Statement set forth in the government's

petition (at 7-9) and files this Brief for the purpose of setting forth additional reasons in support of the petition that were not presented by the United States. These additional matters include serious constitutional questions raised by the inverse condemnation procedure and a question of statutory interpretation expressly left open in *Minnesota* v. *United States,* 305 U.S. 382, 391 (1939).

ADDITIONAL REASONS FOR GRANTING THE PETITION

1. The Ninth Circuit Court of Appeals has stated that the inverse condemnation process, by which an entity clothed with the sovereign power of eminent domain "seize[s] [private property] and say[s] 'sue me,' is high-handed government conduct and not to be favored." *United States* v. *Herrero,* 416 F.2d 945, 947 (1969), *cert. denied,* 397 U.S. 973. Recent congressional legislation reflects the same attitude. *See* Pet. at 13 n.12 and 15 n.14.

It is one thing for the Congress to authorize condemnation of twelve million acres of allotted Indian land (*See* Pet. at 9) with all of the protection afforded by federal courts, the judicial process, and representation by the United States;[1] it is quite another to conclude that Congress intended to subject tens of thousands of Indian landowners to "high-handed government conduct."[2] Such a result should not be ascribed to

[1] *See* Minnesota v. United States, 305 U.S. 382 (1939).

[2] "Condemnation" and "inverse condemnation" connote two very different causes of action. One is brought by a governmental entity to acquire title to property; the other is brought by a landowner to recover just compensation. There is no evidence that Congress had the latter idea in mind when Section 357 was enacted in 1901. *See* Pet. at 12.

Congress in the absence of an express directive. *Bryan* v. *Itasca County,* 426 U.S. 373, 392 (1976); *Squire* v. *Capoeman,* 351 U.S. 1, 6-7 and 10 (1956). *See also Menominee Tribe* v. *United States,* 391 U.S. 404, 412 (1968) ("declin[ing] to construe [seemingly unambiguous statute] as a backhanded way of abrogating" Indian property rights). In *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 70 n.30 (1978), the Court relied on the government's "overriding duty to deal fairly with Indians" in finding that Congress did not intend to create a cause of action against tribal officials when the Indians had not had a prior opportunity to present their views. Application of that principle in this case leads to the conclusion that Congress did not authorize the seizure of allotted lands and impose on the United States and the Indians the onus of seeking judicial redress.

2. If allowed to stand, the lower courts' reasoning leads to the conclusion that the seizure of property, taken in conjunction with the running of the applicable statute of limitation,[3] would result in the permanent taking of Indian lands without any compensation. *See, e.g., United States* v. *Dickinson,* 331 U.S. 745 (1947). Indian allottees require protection from the United States, *Board of County Commissioners* v. *Seber,* 318 U.S. 705, 715 (1943); *Tiger* v. *Western Investment Co.,* 221 U.S. 286, 310 (1911), and the United States "is faced with an almost staggering problem in attempting to discharge its trust obligations with re-

[3] It is unclear whether state statutes of limitations would be incorporated by virtue of 25 U.S.C. § 357 or if the federal statute, 28 U.S.C. § 2415, would apply. It is important to note that the federal statute applies only to actions for money damages; it does not permit the extinguishment of title by adverse possession and the like. *See* 28 U.S.C. § 2415(c).

spect to thousands upon thousands of scattered Indian allotments," H.R.Rept. No. 2503, 82d Cong., 2d Sess. 23 (1952), quoted in *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968). Therefore, the lower courts' decisions can result in the uncompensated transfer of tens, perhaps hundreds, of thousands of acres of Indian lands to non-Indians. In that event, there would not be any proceeds that could be reinvested in other trust or restricted lands. This conflicts with clear congressional policy. *See Minnesota* v. *United States, supra,* 305 U.S. at 388; Pet. at 15-17. Under these circumstances, "inverse condemnation" is more than "high-handed," it is confiscatory.

3. The power of governmental entities to take private property through seizure poses serious constitutional problems that have never been addressed by this Court. This case provides the opportunity to prescribe constitutional limits on that power.

Seizure of property by the government without providing the owner with either notice or an opportunity to be heard constitutes a blatant denial of procedural due process.[4]

> For more than a century, the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."

Fuentes v. *Shevin,* 407 U.S. 67, 80 (1972). This Court has twice held that municipalities cannot acquire property by condemnation without first providing actual and personal notice to the affected property owners. *Schroeder* v. *City of New York,* 371 U.S. 208 (1962); *Walker* v. *City of Hutchinson,* 327 U.S. 220 (1946). *See also St. Louis & K. C. Land Co.* v. *Kansas City,* 241 U.S. 419, 427-428 (1916). In the *Schroeder* case the Court specifically held that the physical diversion of a river does not constitute the requisite notice.

> [K]nowledge of a change in the appearance of the river is far short of notice that the city had diverted it and that the appellant had a right to be heard on a claim for damages resulting from the diversion. That was the information which the city was constitutionally obliged to make at least a good faith effort to give personally to the appellant . . . .

371 U.S. at 214.[5]

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[4] Since the United States sometimes acquires property through seizure, *see, e.g.,* United States v. Dickinson, *supra;* United States v. Causby, 328 U.S. 256 (1946), it could not be expected to argue that the process is constitutionally infirm. And virtually all of this Court's decisions on the subject of inverse condemnation were the product of suits initiated by landowners seeking just compensation for the taking of their property. Procedural due process issues would not arise in this context. One exception is Schroeder v. City of New York, 371 U.S. 208 (1962), quoted and discussed *infra.*

[5] If the government can seize real property and say "sue me," why can it not replevin personal property, or terminate welfare benefits, or suspend driver's licenses, or garnish wages in the same way? *Compare* Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Bell v. Burson, 402 U.S. 535 (1971); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); and North Georgia Finishing, Inc. v. Di-Chem, 419 U.S. 601 (1975). Under what rationale can property interests that are not protected by the Just Compensation clause of the Fifth Amendment, *see, e.g.,* Fuentes v. Shevin, *supra,* 407 U.S. at 86; Bell v. Burson, *supra,* 402 U.S. at 535-539, be entitled to greater due process protection than vested property rights?

The right to notice and an opportunity to be heard is particularly vital where, as here, the applicable condemnation statute permits the landowner to challenge the authority, necessity, and extent of the taking. Alas. Stat. § 09.55.280.[6] When the taking occurs without notice, those rights are forever lost. *Cf. Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952); *United States* v. *Winnebago Tribe of Indians,* 542 F.2d 1002 (8th Cir. 1976).

For all of these reasons, the inverse condemnation procedure must be kept within, and restricted to, prescribed limits. At its core, it is a remedy available to a landowner when the government "put[s] on the owner the onus" of initiating legal action to protect his property. *United States* v. *Dickinson, supra,* 331 U.S. at 748. It is most classically applied when the decision not to initiate condemnation proceedings is based upon a good faith belief that Fifth Amendment protected property rights have not been invaded. *See, e.g., United States* v. *Causby,* 328 U.S. 256 (1946); *Tempel* v. *United States,* 248 U.S. 121 (1918). It is not and should not be treated as an alternative to condemnation, particularly when there are established judicial procedures that provide for the taking of immediate possession upon the filing of a declaration of taking and the posting of a bond. *See* 40 U.S.C. §§ 258a-258e; 6A Nichols on Eminent Domain § 27.25 [Rev. 3rd ed.

[6] Further protection to affected landowners is provided by Alas. Stat. § 09.55.300 which empowers the court "to limit the amount of property sought to be condemned if, in its opinion, the quantity sought to be condemned is not necessary."

[7] These careful thought-out procedures aimed at protecting the property owner while allowing governments to avoid delay in acquiring necessary property are rendered superfluous if property can be seized at any time without providing any notice whatsoever.

1976]; Alas.Stat. §§ 09.55.380-09.55.460.[7] The decisions below ignore the procedural due process issues inherent in the taking of private property by seizure and encourage the abuse of power by executive officials.[8]

4. *Minnesota* v. *United States, supra,* 305 U.S. at 388-389, holds that Section 357 constitutes a limited waiver of the sovereign immunity of the United States by subjecting the United States to defend federal court suits to condemn allotted lands. Construing the statute as imposing on the government the considerable additional burden and expense of discovering all seizures of allotted lands by persons and entities vested with the power of eminent domain under state law and of initiating and prosecuting innumerable inverse condemnation actions goes well beyond that. That extra step requires reading far more into the statute than appears on its face or by necessary implication. It is contrary to the principle "that a waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.' " *United States* v. *Testan,* 424 U.S. 392, 399 (1976), quoting *United States* v. *King,* 395 U.S. 1, 4 (1969).[9]

5. Section 357 must be read in conjunction with statutes governing the acquisition of rights of way or

[8] E. P. Jacobs v. United States, 290 U.S. 13 (1933), holds that the landowner seeking just compensation is entitled to interest from the date of taking as a matter of constitutional law. A contrary result would have encouraged governments to seize and say sue me. United States v. Dickinson, *supra,* can be seen in the same light. By contrast, the decisions below have the opposite effect. *See* Pet. at 15-17 and 19-20.

[9] Congress has been very careful not to waive sovereign immunity in ways that might prove harmful to Indian interests. Thus, for example, Congress has authorized quiet title actions to be brought against the United States but that statute expressly excludes Indian lands in which title is held by the United States. 28 U.S.C. § 2409a.

highways across allotted Indian land. Taken together, these statutes form a comprehensive scheme that precludes acquisition of such rights of way without obtaining the permission of Tabbytite and the Secretary of the Interior. This issue was in *Minnesota* v. *United States, supra,* but was left open. 305 U.S. at 391.

Section 357 was enacted as the second paragraph of Section 3 of the 1901 Indian Department Appropriations Act. 31 Stat. 1058, 1084. Section 4 of that same Act, now codified as 25 U.S.C. § 311, authorizes the Secretary of the Interior "to grant permission, upon compliance with such requirements as he may deem necessary, to the proper state or local authorities for the opening and establishment of public highways" through tribal and allotted lands. The question presented in this case, as well as in *Minnesota* v. *United States, supra,* is whether Section 357 provides an alternative vehicle for obtaining highway rights of way across allotted land without the Secretary's permission.[10]

In *Minnesota* v. *United States, supra,* Solicitor General Robert H. Jackson argued on behalf of the United States that Section 357, "read in context, merely prescribes the procedure to be followed in a suit for the condemnation of Indian land after authority for the condemnation has been obtained from the Secretary of the Interior," and that Section 4 of the 1901 Act, 25 U.S.C. § 311, "clearly covers all acquisition of Indian land for highways, whether by condemnation or negotiation, and requires the acquiring authority to secure the permission of the Secretary for such acquisition." Brief for the United States in Opposition, *Minnesota* v. *United States,* O.T. 1938, No. 73, at 7; Brief for the United States, *Minnesota* v. *United States,* O.T. 1938, No. 73 at 18-19. A contrary construction, the Solicitor General argued, would make the statute "self-contradictory" and "largely inoperative." Brief for the United States in Opposition, *supra,* at 8. This position is further supported by two canons of construction, that ambiguity must be resolved in the Indians' favor, *Bryan* v. *Itasca County, supra,* 426 U.S. at 392, and that:

> However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'

MacEvoy v. *United States,* 322 U.S. 102, 107 (1944), quoting *D. Ginsberg and Son* v. *Popkin,* 285 U.S. 204, 208 (1932). *See also Morton* v. *Mancari,* 417 U.S. 535, 550-551 (1974) ("where there is no clear indication otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priorities of enactment.").[11]

A subsequent statute lends added force to this argument. In 1948, Congress enacted a law providing "for simplification and uniformity in the administration [of grants of rights of way for any purpose over indi-

[10] The sparse legislative history does not shed any light on the relationship between the two provisions. *See* Pet. at 12.

[11] If the rights of way for roads can be acquired by seizure or through condemnation regardless of the desires of the Secretary of the Interior, it is highly improbable that anyone possessing the power of eminent domain under state law would ever seek to obtain the Secretary's permission subject to "compliance with such terms as [the Secretary] may deem necessary."

vidually and tribally owned land]." 62 Stat. 17; S.Rep. No. 823, 80th Cong. 2d Sess. 3 (1948). Section 1 of that Act, 25 U.S.C. § 323, empowered the Secretary of the Interior "to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any land now or hereafter held in trust by the United States for individual Indians or Indian tribes. . . ." Payment of just compensation, as determined by the Secretary, is required. 25 U.S.C. § 325. The consent of the Indian owner (tribes as well as allottees) is required except in specifically enumerated circumstances when obtaining consent is impractical, none of which are present in this case. 25 U.S.C. § 324; 25 C.F.R. § 161.3. And Section 4 of the 1948 statute, 25 U.S.C. § 326, provides that "[t]his Act shall not in any manner amend or repeal the provisions of the Federal Water Power Act . . . nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian land be repealed hereby." There is no mention of any laws providing for the condemnation of Indian property or of Section 357.

The protections afforded by the 1948 Act and its comprehensiveness would be nullified if rights of way could be obtained by condemnation or seizure. And the omission of any reference to condemnation or to Section 357 in Section 4 of the 1948 statute indicates that Congress did not intend to preserve the condemnation alternative as a method for obtaining rights of way. Two of this Court's recent Indian decisions hold that Indian statutes enacted in furtherance of now discarded policies (such as Section 357) must be construed in light of intervening laws that implement different policies (such as the ones reflected in the 1948 statute). *Bryan* v. *Itasca County,* 426 U.S. 373, 386-387 and 388

n. 14 (1976); *Moe* v. *Confederated Salish and Kootenai Tribe,* 425 U.S. 463, 477-479 (1976). The *Moe* decision is particularly significant. It holds that an allotment statute, 25 U.S.C. § 349, that is in some respects similar to Section 357, has been effectively repealed by implication as a result of more modern legislation.

Three lower court decisions deal with these questions relating to the interaction of the condemnation and right of way statutes but reach conflicting results. *United States* v. *State of Minnesota,* 113 F.2d 770 (8th Cir. 1940), holds that highway rights of way across allotted land can be acquired either through condemnation pursuant to Section 357 or by a grant from the Secretary under the 1901 highway right of way provision, Section 311.[12] *Nicodemus* v. *Washington Power Co.,* 264 F.2d 614, 618 (9th Cir. 1959), holds that Section 357 and the 1948 statute, Section 323, offer two alternative methods for acquiring rights of way across allotted Indian land. *Plains Electric Generation and Transmission Cooperative* v. *Pueblo of Laguna,* 542 F.2d 1375, 1379-1381 (10th Cir. 1976), holds that a 1926 statute authorizing the condemnation of land held by the Pueblo Indians of Mexico was impliedly repealed by the 1948 statute as applied to the acquisition of rights of way. The lower court decisions in this case do not address this issue.

The question left open in *Minnesota* v. *United States, supra,* 305 U.S. at 391, "whether, as a matter of sub-

[12] This result was reached by ignoring the applicable canons of construction (*see supra* at 9) and by relying on an alleged administrative construction that is directly contradicted by contemporaneous material cited by the Solicitor General. *See* Supplemental Memoranda for the United States, Minnesota v. United States, O.T. 1938, No. 73.

stantive law, the lack of assent by the Secretary of the Interior precluded maintenance of the condemnation proceedings'' is presented in this case [13] and warrants this Court's consideration.

CONCLUSION

For all of these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 11, 1979

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[13] If a highway right of way through Tabbytite's allotment cannot be acquired without the consent of the Secretary of the Interior and Tabbytite, an easement for that purpose certainly could not have been acquired by seizure and therefore ejectment and trespass damages were the appropriate remedies.

Supreme Court, U.S.
FILED
NOV 17 1979
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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1693

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

GLEN M. CLARKE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED MAY 10, 1979
CERTIORARI GRANTED OCTOBER 1, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1693

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

GLEN M. CLARKE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Trial Testimony of Jack M. Spake in *United States* v. *Clarke*, No. A-69-69 (D. Alaska June 28-30, 1972) (Tr. 179-195)

[179] JACK M. SPAKE

being first duly sworn upon oath, testified as follows:

THE CLERK: Please state your full name for the record, and spell your last name.

THE WITNESS: My name is—

THE COURT: Just a moment. I might state for your information that multiple counsel will follow the same order of examination throughout the entire trial. You will examine the witness, then it will be Judge McCarrey, then Mr. Lekisch and then it goes to Mr. Petersen and then Mrs. Short so that it will be the same rotation. That seems to be the only fair way to do it.

THE CLERK: Please state your full name for the record, and spell your last name.

THE WITNESS: Jack M. Spake, S-p-a-k-e.

THE COURT: Counsel?

DIRECT EXAMINATION

BY MR. MAFFEI:

Q What is your residence address, Mr. Spake?

A 3837 Queens Way, Anchorage, Alaska.

Q What is your business or present occupation?

A I am a professional engineer, registered in the States of Indiana, Alaska, and also district engineer, Department of Highways, for the Central District.

Q For what period of time have you held that position?

[180] A I have been here two years, district engineer.

MR. McCARREY: Your Honor, at this time, based on my knowledge of Mr. Spake, I would be willing to stipulate that he is an expert in the engineering field.

MR. PETERSEN: I will so stipulate, also, your Honor.

MS. SHORT: I will so stipulate, your Honor.

MR. LEKISCH: I will so stipulate, your Honor.

THE COURT: His qualifications are stipulated to. You may then proceed directly to your case.

BY MR. MAFFEI:

Q You must be well known, Mr. Spake. I didn't know you had that high of qualifications.

A I have been called many things, including an engineer.

Q Have you ever traveled the road up to Glen Alps?

A Many times, yes.

Q And when has that been, and over what period of time has that been?

A I would say approximately four years, when I first became acquainted with the Glen Alps area. I am always searching for new highways for roads and et cetera.

Q All right, would you try to estimate for the Court how many times that you have been up there within the last four years?

A I would say at least 35 or 40 times.

Q Have those trips always resulted in your reaching Glen Alps itself?

[181] A Yes, sir.

Q Speaking particularly about the area that Mr. Clarke homesteaded, are you familiar with that?

A I know approximately where it is. It has been pointed out to me, yes.

Q Are you acquainted with the property owned by Dr. Bach?

A Yes, sir.

Q Are you acquainted with the property owned by Miriam Baker?

A Yes, sir.

Q Have you ever been up to those two residences?

A I have been in both of the—these residences, yes, sir.

Q You indicated that you, as a highway engineer, are always interested in searching for new roads or roadways?

A Yes.

Q Were you up there on state business?

A Yes, it has been, many times. We extended our main system on past, as far as we go in this area. We do not go completely up there. We stopped before we got into the sharp turns. There is a sign that says that the state ends at this point. And through many people, and also the Department of Natural Resources, Parks and Recreation, they are in turn looking for entrances to the Chugach State Park. That was part of my job and duty to assist the Department of Recreation to try to find the most feasible route. This particular route was considered at one time as an entrance. [182] As of now, I don't believe it has been in this particular category.

Q Perhaps I better have you step down to this board here. Have you seen this map here before, the contour map and topographic map?

A I am familiar with the general contours, somewhat, yes.

Q Could you step down to the map?

A Yes, sir.

MR. MAFFEI: May I approach the witness at the board?

THE COURT: Yes, you may. Speak up so that we can hear you.

BY MR. MAFFEI:

Q Stand back so the judge can see what we are doing here.

A Yes, sir.

Q The roadway that we are concerned about is this roadway here on this map, and at this point it enters the Tabbytite homestead and goes on up and makes the turn here (indicating) and then comes back on the Tabbytite homestead and up to the Clarke's and the Baker's residences. Now, have you been up that particular road?

A Yes, sir.

Q And are you familiar with the terrain and the topography as it is outlined on that map?

A In general, yes.

Q And in viewing that road itself, in your opinion as an [183] expert, would you state your opinion as to whether or not that road is a feasible spot or not?

A I would say in my observation and analysis of the contours as shown on this map, the road is about as well placed. I believe, as you could actually put a road of this type. At all times, when going up from A, you might say zero elevation, up to the elevation we are talking about here, 2,000 feet, you have to do a lot of research and you have to look, and usually these types of roads are planned, we find, these original trails are the best place to construct either a highway or an access to the property (indicating). The contours vary here, and I would say that from an engineering standpoint you would try to maintain a road at least on a 15 per cent grade, which is feasible, and anything over 15 per cent you will run into problems, and eventually here, because you are up above the snow line and you get into a lot of snow and ice conditions. And a 15 per cent grade is just about the maximum that you want to construct any type of road.

Q I will point out to you this section line that is on the north side of the Tabbytite homestead. Have you had a chance to observe that area extending from the road on east to the corner of that section?

A Along this particular section here, as you are coming up around this area, going to this corner here (indicating), [184] you are running into high and quite sudden elevation, but approaching more than a 15 per cent grade. And to try to maybe come up this way (indicating), this way you come to a creek area, undesirable because it seems to collect all the debris and peat and so forth.

Up here (indicating) the stream is going around here and you run into the problem of getting a more than 15 per cent grade in this particular area here. By coming up this way (indicating), swinging back and forth, they have utilized the natural terrain in order to get a road that I feel for this particular area is maybe the best location. If you want to spend an awful lot of money, yes, you could probably come up and lengthen

this, and it would take a lot more in order to get a 15 per cent grade.

But to construct a road or coming up from the back side here (indicating), or this trail going along here, and I think this is the Rabbit Creek Road, and to come up this way you are increasing the steepness of your road considerably more than this way or the road already constructed. This would be impossible down here to come up on this space with this particular area through here on into this area, here, either (indicating).

Q If we were to follow the section line, north section line, eastward to where it comes to a corner, following that section line itself, can you state your opinion as to whether [185] or not it would be feasible, practical and possible to build a roadway along that section line?

A It would be possible, but not feasible on account of the cost to construct it, here (indicating). I believe this, following the contour would be a little better, and to maintain probably the 15 per cent grade rather than coming up here, here you get into a much steeper grade up here (indicating). And like I said, it could be done. It would be quite costly.

Q Have you any estimate or opinion as to what the additional cost might be for something like that?

A This particular stretch of road, to come through—you are talking about this one particular area now?

Q Yes, about negotiating that rise and then turning to the right and going on and coming back to where you enter back into this property here (indicating).

A Well, you have a unique situation there where you are coming up and then you go back down again, you have to go this way—I would say the cost to come across and back around would be in the vicinity of $15,000 to $20,000. And you would have a snow problem here, you know, because of the heavy snowfall and the heavy winds. And any grade or obstruction you have causes the roads to block up with snow and it is quite costly to keep them open, or it open, in the winter time.

[186] Q You said, I think, that would probably increase the grade more than 15 per cent?

A Yes, according to the contour on the map as shown here, it would be 15 to 25 percent for this type of road.

Q It has been said that this area down here is steep as that area and this road has been built. Are you familiar with that hairpin turn?

A Yes, I would say you probably have a steeper grade than you do at this particular point.

Q And that area, however, follows a contour, does it not, that particular roadway?

A Yes, that is a general pattern on this type of road, you fish back and forth to gain your altitude and then try to maintain a uniform grade.

Q Would you have to follow the same type of procedure when—if you went up the section line here, or tried to?

A Well, I haven't climbed that. My observation has been from the road itself. You would have to probably fish back around and come back around this sharp curve in this particular area and come back over here and then proceed on up to the Glen Alps area. Your high point is right in this particular area (indicating), and from this point, then, you come over to this maximum of 2,600 feet in this particular area. Here is the last thousand at Dr. Bach's house area. It is very difficult to construct a road in this type of [187] terrain where you are—as you have seen from the development of this particular area there are several fishbacks back and forth and very severe grades and very hard to maintain in the winter time.

MR. MAFFEI: I don't think I have any other questions at this time, your Honor.

THE COURT: Mr. McCarrey?

MR. McCARREY: No questions, your Honor.

THE COURT: Mr. Lekisch?

MR. LEKISCH: No questions, your Honor.

THE COURT: Mr. Petersen?

MR. PETERSEN: I have several questions. Perhaps I could approach the witness.

THE COURT: You may.

CROSS EXAMINATION

BY MR. PETERSEN:

Q Mr. Spake, have you actually made any survey of what the grade would be along the line of this property here up the hill (indicating)?

A No, sir.

Q You have made no survey?

A Oh, visually, visual observation.

Q Is there any reason that you know of why the road could not turn to the left in this area here just east of where it is presently located and go right around the hill, following [188] along the contour?

A You come along over here (indicating), you are on the contour.

THE COURT: We can't hear you. You said something about following along, and we lost you.

THE WITNESS: Well, you would approach the area, the way the road is here, the question is would you continue along the section line?

BY MR. PETERSEN:

Q The question I asked now is, is there any reason why, when it got too steep, the contour couldn't be followed right around the hill?

A It is possible to come right around the elevation, then you are getting back steep downward slope in here (indicating).

Q Where is that?

A Right through this Y (indicating).

Q But that isn't indicated on the contour on the map, is it?

A You go from 2,100 contour down to approximately an area of 2,300, so the terrain does show you go down. You are probably around 100 foot elevation and it continues to slope down 1,000 feet onto the valley from this old trail that goes back in here. You contour and you do go down that far.

THE REPORTER: I cannot hear him.

[189] THE COURT: Mr. Petersen, I don't know what benefit the testimony is. Neither the court reporter nor I can hear the witness.

MR. PETERSEN: Would you please speak up, Mr. Spake?

THE WITNESS: Yes.

MR. PETERSEN: I do think it is necessary for him to stay by the exhibit.

THE COURT: I don't have any objection to that, counsel. The problem is the colloquy between counsel and the witness and excluded from everyone else.

MR. PETERSEN: I'm sorry, your Honor.

BY MR. PETERSEN:

Q Now, in this area beside the hill here where the elevation is marked 2,264, at the top of the hill, isn't it clear that the slopes are gentle, at least as shown on the contour map?

A It shows the difference of approximately 100 feet between this contour and this one going down (indicating). That would not be excessive, except you have to swing back again and you have to swing up and—going to this area (indicating) you go higher on up in here as you approach this particular area here. Like I said, it is not impossible to build around this area, but the cost, cost-wise if you are willing to pay the price, you can build a road any place. I said, and I will say it again, I think from my own personal [190] observation from the original lines put in here, to the best of my knowledge that is the best place and most economical place to place the trail.

Q This, of course, is without taking into consideration the cost of acquisition of land?

A Yes, sir. To go in and survey this type of road would be costly, too, and we didn't do that for our own personal benefit because we felt there would be no need for the type of highway we would build in this area. We did not further try to gain any additional knowledge from the point where we stopped was back here (indicating).

Q Do you have any knowledge as to whether it would be any more difficult to build a road in this area to have access to Mr. Clarke's property and to the old Spaulding homestead than it was to build a road right here (indicating)?

A I would say that—

MR. McCARREY: Your Honor, we do not have a record on "this" and "there". If there was some way counsel could identify it as to "this" and "there"—

THE COURT: I don't know how, counsel, not unless you want to have him make marks and put A and B or something.

MR. PETERSEN: I identified the first place by the Spaulding property, on the Spaulding property, and the other location is in the area where Mr. Clarke first commenced his road from the end of Huffman Road, I believe it is.

[191] BY MR. PETERSEN:

Q It appears to me that the contours are approximately the same distance apart where Mr. Clarke already built the road as they are over here on the Spaulding property where I am suggesting. Isn't that correct?

A I disagree, and because, as you can see, this particular area, the contours are closer together. As you get closer your elevations go up. It is much steeper. Here (indicating) they are all farther apart.

Q And here (indicating)?

A In that—no, that particular area, but here you have this whole area.

Q Would you stop just a moment. You said in that particular area, no, didn't you, and I want the court reporter to hear you say no, because you said it very low. Isn't that what you said?

A Well, I would say this particular area where you are coming through here now would be easier to develop a road than to come on around over the old Rabbit Creek road, I believe that is what they call it, due to the fact that this is not quite a vertical, but you have to fishback back and forth, back and forth, in order to get back to this area (indicating).

Q Would it be approximately the same, though, as to what Mr. Clarke did at the end of Huffman Road?

A Well, your contours indicate this part—here again, your [192] contours widen out as you come back this way, which makes it easier to construct the road (indicating).

MR. PETERSEN: I believe the witness may resume the witness stand. We have the last item entered into evidence—(Pause)

THE COURT: Eighteen, do you mean, counsel?

MR. PETERSEN: I believe that is the number, yes.

THE COURT: That is the last one.

MR. PETERSEN: May I approach the witness?

THE COURT: Yes, you may.

BY MR. PETERSEN:

Q Mr. Spake, I have handed you Exhibit 18 in this case. I notice it is from the state, Department—a letter from the state, Department of Highways, with a diagram attached. Are you familiar with this in connection with your employment? I know it is not signed by you.

A I am in communication with Dale Tubbs quite often.

Q Will you look at the diagram on a contour map attached to that letter and note alternate B. Now, do you know if that alternate is feasible?

A Well, I would like to say it would take further investigation before I would like to make a statement whether I would build a road there, as far as an official highway—an official of the highway department. It would have to be surveyed.

Q Would Mr. Tubbs have known, though?

[193] A Well, I wouldn't say.

Q He is in your department, is he not?

A He is not in my department. He is employed by the Department of Parks under Mr. Keenan.

Q All right.

A Like I say, this was considered at one time as an entrance into Chugach Park.

Q You don't know whether or not Mr. Tubbs had made a study before he wrote that letter and proposed that alternative?

A I would say he probably made a study, but how much of a study I would not care to comment on.

Q Referring again to the contour map over on the board, and in the area that I pointed to at the beginning of the road built by Mr. Clarke, where that road leaves Huffman Road just after the area where the state has the sign about "This road not maintained," is the rise there more than 15 per cent?

A I would not care to comment on that until I make a further detailed investigation, but from the contours it would indicate anywhere from 10 per cent to 20 per cent or greater in different places.

Q Do you have any less information about the per cent of the rise on the grade there than you have in the area that Mr. Maffei was asking you about, in the northeast corner of Mrs. Tabbytite's property?

[194] A I don't believe I quite understand the question.

Q In other words, you are just as qualified to estimate that grade as you are the grade you are estimating for Mr. Maffei, aren't you?

A Well, I would say yes.

Q Are you familiar with where the gas line and the Chugach Electric lines are located just a short distance to the east of the property that Mr. Maffei was pointing, and that I was pointing to on the map?

A I would say no. I know where they are up there, but the actual location—

Q Are you familiar with the road that follows those lines?

A I am familiar with the road going up there. As far as the utilities of any kind, the only utilities I am aware of is the telephone tower on top of the back of the property of Mrs. Baker.

Q Are you familiar with the road that you can travel on from the end of O'Malley Road on up along the utilities lines?

A I don't think I will answer that, because the next question, did I go up and observe the utility and telephone lines, I don't feel that I would be required to answer that question without further investigation.

Q You have not been over that road?

A Well, I will go back to my original statement. I have been on this road up to Glen Alps. That is the only road I have [195] been up to this particular—

Q You don't know there is another road that goes up there?

A I assume there are many roads in that whole area that go up to this particular area. I would not say.

MR. PETERSEN: I have no further cross examination.

THE COURT: Mrs. Short?

MS. SHORT: No cross examination.

THE COURT: Mr. Maffei?

MR. MAFFEI: No, your Honor.

THE COURT: May this witness be excused?

MR. McCARREY: Your Honor, may I ask a question based on Mr. Petersen's examination?

THE COURT: Yes, you may.

CROSS EXAMINATION

BY MR. McCARREY:

Q Mr. Spake, I think you testified that the road could be built to the north of the Tabbytite property at a greater expense; is that true? Did you not so testify?

A It would cost money, yes.

Q Now, here again, would you not have to also assume that the land was available for the building of the road?

A You would have to have a right of way.

MR. McCARREY: That is all

THE COURT: You may step down. Thank you, sir.

* * * *

Trial Testimony of Rodney Spendlove in *United States* v. *Clarke*, No. A-69-69 (D. Alaska June 28-30, 1972) (Tr. 209-219)

[203] RODNEY SPENDLOVE

being first duly sworn upon oath, testified as follows:

THE CLERK: Please state your full name for the record, and spell your last name.

THE WITNESS: Rodney Spendlove, S-p-e-n-d-l-o-v-e.

THE COURT: Mr. Maffei?

DIRECT EXAMINATION

BY MR. MAFFEI:

Q Where do you reside, Mr. Spendlove?

A On Upper DeArmoun.

Q Is that anywhere near the Clark or Tabbytite properties?

A Well, my property borders on the west side of the Tabbytite property.

Q Your property borders on her west boundary?

A Yes, sir.

Q How much of the land do you have, or did you have there?

A Well, originally I had 98.9 acres.

Q Are you familiar or acquainted with that road that traverses across the Tabbytite property along the north and east parts of the property up to Glen Alps?

A I am not too familiar with it way up on the back end. Years ago I traveled by foot over that property.

[204] Q Over which property?

A All of it there, before I took my homestead, and while I was homesteading and while I was staking out Mrs. Tabbytite's property.

Q You helped her stake her homestead out?

A Yes, sir.

Q Did you have anything to do with the construction of that road across that portion of her homestead?

A No, sir, I didn't even know that it was even in there until about '61. I knew there that the road went to a switchback, but I had not been back in there.

Q Have you ever used that road for any purpose at all, traversed across it?

A I was over it one time.

Q When was that?

A I rode up with Craig Thomas the night of the election to the City of Glen Alps and to Mrs. Baker's house.

Q Have you ever been across the road any other time other than that?

A I have used the road up to—not that far. I have been just about to Murray's cabin, two or three times.

Q I am now talking about the road where it enters the Tabbytite homestead at this point (indicating).

A No.

Q And this point.

[205] A No, that area there only one time I have been over it.

Q How did you travel across it at that time?

A I was a passenger in Craig Thomas' car.

Q Have you ever cut any trees or disturbed the ground on Mrs. Tabbytite's homestead in that area?

A No way.

Q Would you have any reason to cross that portion of her homestead for any purpose? Did you own any land there, or was there any reason to cross her homestead?

A No reason unless I was invited as a guest to someone from up in that area. There is a state park right on the other part now—

Q Have you ever used that roadway to travel to the state park?

A No, but I was referring to when Mr. Spake was talking about a while ago.

Q Would you step down to the map, please, and I am going to turn to another subject matter now.

MR. MAFFEI: May I approach the witness?

THE COURT: You may.

BY MR. MAFFEI:

Q Before we start, I probably should ask you while you are still over here to speak up so everyone can hear you.

You indicated you had been over in the area and helped Mrs. Tabbytite stake it out; is that correct?

A Yes, I walked the area a number of times.

[206] Q Have you also been engaged in the road building business?

A For 19 years here in Alaska.

Q Has that been continuous?

A Yes, sir.

Q A continuous occupation?

A Yes.

Q And what—can you tell the Court what experience you have had, what roads you have built and the projects you have had?

A Yes. Well, I built two different sections on the Copper River Highway, and a half mile at Five Mile and right in front of the airport at Cordova, a little over three miles. And up here by the Chickaloon bridge I built the approach to that, and a turn, and I have built a number of these roads up in this particular area, too, that we are talking about.

Q Have you built roads out here to your homestead, down west of that?

A Yes, the subdivision part, I put in all the roads to that, plus the other roads for Tabbytite and from the Bureau of Land Management I had been given orders in order to prove my plat.

Q In looking at the map there you can see where the road is, can you not?

A This one here (indicating), yes.

Q Do you know of any other place or any other alternate route [207] where they could have placed that road?

A Well, actually, to gain access to this particular area (indicating) that was just about the best. And like running the pipeline through, why, the construction company used that because it was the most feasible.

Q I think we were talking—there was some testimony about—going up the north section line to the northeast corner of the property, do you know whether it would be feasible to construct a road up that line to that corner going right along the line, given 30 feet, and constructing it right up to the corner?

A Well, there is probably about a 120- or 140-foot rise from right here to the corner (indicating), and that would be in about 460 foot. I would say that would be about a 25 per cent grade, which is very, very steep, and they don't let you construct roads any steeper, normally, than about 11 per cent.

Q Could that be constructed in the space of 30 feet, 30 feet wide?

A Well, if you are coming straight up the hill you are still coming on a 25 per cent grade. It would be very difficult. Like over here on this switchback, I heard somebody mention it a while ago, I think Mr. Petersen asked the question, would you follow the contour, you are going parallel with the contours as they rise. There is just a gradual cut into the [208] contours.

Q What would it be doing, in effect, if you are going up the section line here (indicating)?

A Well, you are going to—just like it was explained a while ago. Here is the section line over here (indicating). This is just a—her north property line.

Q I meant her property.

A I don't think there can be any road constructed in this area since the park took over.

Q What is the nature of the land in those areas?

A I would say it's, in these areas here (indicating), it is swampy. Where she dropped down in here there is water settlement and here is your drainage basin, and your contours come down here to here. This is the Campbell Creek drainage areas. Also the drainage here, from here, this way, there is a high point here (indicating). It's moisture area right in here and swampy.

Q Let's talk about this area back up in here to the northeast of Mrs. Tabbytite's property and around the high place here (indicating). Is that land—what is that land in that area?

A Well, you mean in order to bring the road right up to here (indicating)?

Q I am talking now about around that point, following the contour, going around that point (indicating).

[209] A It is a little—as you see these lines here, it is a little marshy through there, too. There is lots of tundra and the water—it holds the water there and it is soggy, but it is a drainage area. And back here a little further is kind of a glacier in the mountain, up here (indicating).

Q Can you give us any opinion as to what the costs would be in building a road either around there or over the top as opposed to building it up where it is presently located?

A As you see here, your contours come through like this (indicating), and there is a—that means more valley, and what they have done is constructed the road up through here to reach this elevation and then come back around and follow this, these contours to where it could be too steep. Like I said before, coming right straight up here, then, you would have one heck of a rise and the cost—well, actually, it isn't feasible to begin with. But like Mr. Spake says, "If you want to go to the expense, you can build a road anywhere."

Q Would there be considerably more expense going up that way than there would be where the road is presently?

A Well, let's face it, the road is already in, so whatever cost would be laid out, that would be the extra cost, and of course, it would cost more, yes, originally had it come that way.

Q Originally, that is what I meant.

[210] A Oh, yes.

MR. MAFFEI: That is all the questions I have.

THE COURT: Mr. McCarrey?

MR. McCARREY: One question.

CROSS EXAMINATION

BY MR. McCARREY:

Q Mr. Spendlove, to build a road along the north boundary line of Mrs. Tabbytite's property, would it not be necessary to have an easement or right of way to build a road first?

A Most certainly. It either comes up from the—here (indicating), and you are going to have to have one in here from Murrays.

MR. McCARREY: That is all I have.

THE COURT: Mr. Lekisch?

MR. LEKISCH: No questions, your Honor.

THE COURT: Mr. Petersen?

MR. PETERSEN: I have a few questions.

CROSS EXAMINATION

BY MR. PETERSEN:

Q Mr. Spendlove, do you know of any physical reason why a road cannot come along the north boundary of Mrs. Tabbytite's property and to a point approximately at the 19—no, the 2,060-foot contour and then just curve left and follow along that contour and gradually rising around the hill?

A Like I said, it is kind of marshy in here. You got about [211] four times more room, probably closer to six times more room coming around this contour here. Right in here (indicating) you will find it is very swampy and marshy.

Q Yes.

A And it is not feasible to go through this way.

Q And this is very swampy and marshy right in here, also (indicating)?

A Well, they have already got this cut and ditched through here.

Q Yes, but the job is no greater or would be no greater here in this area that you described as swampy and marshy than it was over there?

A Yes, it takes a heck of a lot construction to even get around to this point, six times more construction.

Q You mentioned the gas company going over that road. Do you have personal knowledge of that, to construct that gas line?

A I have personal knowledge from this point down here (indicating).

Q Do you know if there is a road along the gas line?

A Yes. You come up here—I came up here one day and Mr. Taylor, you know, one of these fellows—

Q Just a moment. You may resume the witness stand. You started to mention about going somewhere with Mr. Taylor one day?

A Yes, sir. It was over further on upper O'Malley and up [212] above around—it doesn't even show—well, yes, sir, it does. No it doesn't, where we first went in. We came back up around, you know. Those homesteaders had an argument over the watershed. Well, he was one of them. He wanted me to do some building of roads for him.

Q And did you go up that road?

A No, I didn't go that road. We come back in through it. It was, oh, about a quarter section. It wasn't clear up in there, but we came up around the other side. We went up to where his property was, the property that he was homesteading.

Q Then you personally have not been all the way along the gas line road?

A No, not all the way along the gas line road, no.

Q Do you have knowledge whether it is possible to travel that in an automobile?

A No.

Q You don't have knowledge?

A Well, the gas—what I thought you were speaking about is the gas line road is beyond where Clarke's road is.

Q I am speaking about the road that goes along the utility lines from the end of O'Malley Road up to the vicinity of the Clarke property.

A Well, we didn't go all the way quite that far. We came up O'Malley and came up and back over and followed the pole line [213] back over to this road where it is on top.

Q You did go up from O'Malley?

A Yes.

Q There is a road there?

A Well, it dosen't go back over to the pole line. We were in a four-wheeled vehicle.

Q Now, referring to the area of the Spaulding homestead, do you know where that is?

A Yes, that is, I think, the one just south of Clarke's.

Q And referring to Mrs. Tabbytite's homestead, also, you built a road up the hill there, didn't you?

A Well, I cleared my right of way easement up to the quarter section.

Q And you built a road for Mrs. Tabbytite on her property to get up on top of the hill, didn't you?

A I constructed a trail up there.

Q That was passable in a vehicle?

A What kind of vehicle?

Q Well, I don't know. You must know.

A Passable in a Cat.

Q Was it passable in a four-wheeled drive?

A I had a four-by-four. When it was loaded down, I got up.

Q Did Mrs. Tabbytite drive up in it herself, do you know?

A I don't know.

Q You must have had some purpose in building this road there.

[214] A At the time, yes.

Q You must have been attempting to build a road that was usable.

A Well, we had plans on building down around the other way. It wasn't feasible at the time.

Q What kind of vehicle—do you know what kind of vehicle Mrs. Tabbytite had at that time?

A She had a four-wheel-drive.

Q A Jeep?

A Yes.

Q And would it be any more difficult to build a road up the hill on Spaulding's property than it was there?

A Well, what you got to look at is where you start from to the Spaulding property.

Q Well—

A You are still going to go through about six or eight people's property. You are going to have to gain easements from them in order to come up before you could even swing back again.

Q I believe I will have to ask you to approach the map again. Can you identify where your understanding is as to the Spaulding property?

A Right here (indicating).

Q And is it correct that a corner of it would be about right here (indicating)?

[215] A Right.

Q And is there a road what must be not more than 500 feet from the corner of that property?

A Well, then you have to gain permission from the individual here—

Q Do you know who that—

A —to construct here (indicating).

Q Do you know who that individual is?

A Don Rohaley.

Q All right.

A This road right in here is impassable right now. They are parking their vehicles on each side and walking in right today.

Q I believe you can resume the witness stand.

MR. PETERSEN: In fact, I have no further cross examination.

THE WITNESS: Who is—

MR. PETERSEN: I didn't ask you a question.

THE WITNESS: Oh.

THE COURT: Mrs. Short?

MS. SHORT: Just one or two.

CROSS EXAMINATION

BY MS. SHORT:

Q When you say "get permission," what type of permission is it you are understanding it is necessary to get—

[216] A You got to get an easement.

Q —to cross the property? Are you and engineer?

A No, ma'am, I am not an engineer.

Q What is your educational background?

A I have a high school diploma.

Q And you have a contractor's license?

A Yes, ma'am, general contractor's license.

Q How long have you had it?

A This time I have had it three years.

Q And when you said that you are involved in road construction, what type of work did you do in the construction of the roads?

A What type? All phases.

Q All phases. Were you in charge of the work?

A Yes.

Q Did you plat it, plan it?

A These particular roads here, I did, yes.

Q I am not talking about these roads. You referred to the highways that you built.

A Right. You use blueprints. You build it to their specifications.

Q Who makes the specifications?

A You are—if you are working for the highway department, department of highways or department of aviation.

Q In other words, you did not, yourself, make these—

[217] A Not the design, no.

Q You did not?

A No, they do that right in the office.

Q You worked from this, or from them?

A Right.

Q And did you make a number of roads on your own property?

A Yes.

Q And how did you make those roads?

A With a bulldozer.

Q With a bulldozer?

A Right.

Q And did any of those roads have a steeper incline than 25 per cent?

A They were only roads—I did one and that was the one that the Bureau of Land commission condemned, for Mrs. Tabbytite when I put another road so she could gain access at my expense.

Q You are saying then there was only one road you built that had an incline steeper than 25 per cent; is that correct?

A Yes.

Q Did you build any other road on your own property with inclines approaching 25 per cent?

A That's clearing, but not roads. They are trails to gain access with Cats.

MS. SHORT: Thank you. Mr. Spendlove. I have nothing [218] further.

THE COURT: Anything further, Mr. Maffei?

MR. MAFFEI: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. MAFFEI:

Q Mr. Spendlove, I don't think I asked you about the possibility of building a road from this lower—whatever it is, Rabbit Creek—

A Right. It is called officially the Canyon, or I noticed the other day they have another sign up that says Upper DeArmoun.

Q Would it be—would there be any spot up there that you know of where it would be feasible to build a road from the Canyon Road up to the Clarke homestead?

A Well, you could come on up the canyon probably another mile or so and then go back, or you would have to make it probably—well, probably you would have to make a dozen switchbacks there, just zoom, zoom, zoom, and it would ruin the whole property.

Q Right in here (indicating)?

A Right. You can see how close those lines are together. And probably you got to that one dark area there, probably about 700-foot rise there.

Q You said that this road here is in fact impassable (indicating)?

A Yes, it is right now impassable. They are parked, the [219] four-wheel-drive vehicles, on each side of the road there. And then the people with two vehicles are in good shape. They can have one on one side and one on the other.

MR. MAFFEI: No other questions.

THE COURT: Anything further?

MR. McCARREY: No questions, your Honor.

MR. LEKISCH: No questions.

MR. PETERSEN: Nothing further, your Honor.

THE COURT: You may step down.

May this witness be excused?

MR. MAFFEI: Yes, your Honor.

THE COURT: All right.

Trial Testimony of William Wakeland in *United States* v. *Clarke*, No. A-69-69 (D. Alaska June 28-30, 1972) (Tr. 109-117)

[104] WILLIAM WAKELAND

being first duly sworn upon oath, testified as follows:

THE CLERK: Please state your full name for the record, and spell your last name.

THE WITNESS: William Wakeland, W-a-k-e-l-a-n-d.

MR. McCARREY: Your Honor, in deference of time, we would stipulate as to Mr. Wakeland's qualifications.

THE COURT: The record may so show.

MR. PETERSEN: I believe Mr. Wakeland's qualifications are set forth in the appraisal report also, and that has been admitted into evidence. May the appraisal report, which is Exhibit 9, be handed to Mr. Wakeland at this time?

[105] (Document handed to the witness.)

DIRECT EXAMINATION

BY MR. PETERSEN:

Q Mr. Wakeland, you have before you what has been entered as Exhibit 9 in the trial before the Court here. I believe this is an appraisal report made by you in the fall of 1970.

A Yes, sir.

Q Some time has passed since 1970. Do you have any knowledge as to whether the value figures you mention there would have decreased or increased in the interim?

A They most likely would have increased. This appraisal date was December 1, 1970, or approximately 18 months ago. At the time this was accomplished the land values in the region were increased approximately 20 per cent or more per year. I have just inquired what the current zoning status on this property is. It is still a proposed R-6 zone which would coincide with the restrictions placed within the Glen Alps municipal limit; 1.25

acre lots are the minimum lot. The proposed zoning apparently would not detract from the subject value.

MR. PETERSEN: I have nothing further to ask Mr. Wakeland.

THE COURT: Mrs. Short?

[106] CROSS EXAMINATION

BY MS. SHORT:

Q Since your appraisal has there been any change in the nature of the ownership of the land, to wit: In regard to Chugach National or the state park?

A Yes. At the time that I accomplished this appraisal, as I recall, the state park was in the planning stages. I don't think it was an official entity at that time. I guess it—still isn't, for that matter. I don't think the final action has been taken on the change in boundaries. For all practical purposes, it is a state park and it is my understanding it does border a portion of this property.

Q In your opinion, does that have any effect on the evaluation of the bordering land to the state park?

A I feel the lands bordering the state park are enhanced, and by that we will say reservation for public use rather than appropriation for some private development.

MS. SHORT: Thank you, Mr. Wakeland. Nothing further.

THE COURT: Mr. Maffei?

CROSS EXAMINATION

BY MR. MAFFEI:

Q Mr. Wakeland, can you tell us in dollars and cents, please, what is the value of the land? What is your estimate of the value of the land as taken as of this time?

A The part—the value of just the taking?

[107] Q Yes.

A My conclusion, the value of the part taken only, I was also asked to estimate a rental problem, but the

value of the part taken only, I have $2,500 as of December 1970.

Q What would be your opinion of its value today?

A That, I couldn't really advise. I have not made an investigation subsequent to December 1970. I would estimate that it is increased, but I don't know how much. I have not investigated that area to see what the ramifications are.

Q Do you have any knowledge as to what the percentage of increase has been in that particular area, in land value?

A Not since the date of my appraisal. At that time I was using the figure of 20 per cent per year to adjust prior sales, and this appeared, if anything, to be conservative. And judging by what we have seen of Greater Anchorage, the increase since then could be either more or less.

Q But you consider 20 per cent to be a fair increase per year?

A Yes, sir, I think that would probably be close.

Q What about the rental value? Has that increased, or is it the same?

A Well, I discussed here the rental rates on land ranging from six to as high as, I believe, 12 per cent, and I felt that that currently, which at that time was 1970, nine per cent appeared to be a reasonable land lease rate. I now have an opinion that that is probably a little high. I [108] think if anything our rates have tended to moderate, interest rates and mortgage rates, and of course, even the fact that the state now has an eight per cent usury law on interest rates which tends to also affect lease values.

Q What would be the rental value, then, in your opinion, at this stage?

A I would make the—you are just asking my opinion, now, without any research. It has not changed, because I think the rates are possibly down a little and the value is probably up a little, and they tend to offset one another.

Q So you would feel the rental would be, for the 12 years would have been $1,500 and the—whatever that amounts to per annum would have continued on from 1970 to this date?

A I think we would have to add a year and a half to that.

Q Yes.

A I have not done that. I am saying this value has tended to remain rather constant. It does not account for another year and a half use of the property at a rate that would be probably less than I used for 1970 and applied. And it is probably a little higher. I am not prepared to add that on.

Q Under your remark, Mr. Wakeland, on page 16 of your report you have indicated in your remarks that the value would be greater after the roads were built than it was before; is that correct?

[109] A That's correct.

Q Can you state why you made that statement?

A To try to clarify the—well, say the answers that I have in this report. For one thing, I was not sure of the law. I am not legally trained. I don't know whether we operate in a case like this under the laws of the federal government or the laws of the State of Alaska. I was asked to—well, say try to solve a problem through the appraisal process and it was necessary to make certain assumptions to do this. One of the assumptions was that I was solving it in the manner appropriate under Alaska law, in which case a special benefit may be a windfall to the property owner, legally so. What I am saying in the statement under remarks is that under a true before and after rule, which some states do have, there would be no compensation due her at all.

Q What you are, in effect, saying is that the property with the road on it is worth more than what the value of the property taken was; is that correct?

A That's correct.

Q Why is the property worth more with the road on it?

A Because, to be put to any beneficial use or to the highest and best use, that is a better choice of words, the

property must have access. And roads are rather expensive, as we saw here for this 1,500 feet or so. The road seems to be placed in such a manner that it would in fact serve beneficially a [110] part of the property.

Q What did you find the highest and best use of the property to be?

A Potential subdivision, small tracts, in keeping with the restrictions imposed by the municipality.

THE COURT: Would you repeat your answer?

THE WITNESS: I found the best use to be the potential or future subdivision into small tracts.

THE COURT: Anything further?

MR. MAFFEI: May I have a moment, your Honor?

THE COURT: Yes.

BY MR. MAFFEI:

Q (Pause) From your report, Mr. Wakeland, it appears that you took a first-hand view of the property; is that correct?

A That is true.

Q And did you do that by vehicle, or on foot?

A On foot.

Q Did you traverse all of the property on foot?

A No, obviously not, but I traversed enough of it to —well, say inspect it all visually and take photographs of it.

Q When you saw all of the property, did you look at the entire 160 acres of Mrs. Tabbytite's property?

A Well, virtually. I didn't set foot on the whole 160 acres, counsel. That would be a week's undertaking. I located the northeast corner of the property which was rather [111] difficult to find, and the corner and the center and the lines that were brushed through on several of the dimensions of the property. And of course, was through the area where Mrs. Tabbytite has her cabin in the ravine area and all over that plateau area and all across the top of it there. So I feel I fairly well inspected the property, yes.

MR. MAFFEI: May the witness step down here to the map?

THE COURT: Yes.

BY MR. MAFFEI:

Q You will have to step on the other side.
A Yes.
Q What I am particularly interested in is knowing whether you traversed the area where the road is located on Mrs. Tabbytite's property, and then to the east of there, of that (indicating). Were you able to see that?
A Here (indicating)?
Q No, to the east of the road where it enters Mrs. Tabbytite's property.
A Here?
Q Yes.
A Yes, I was trying to locate this point right here (indicating).
Q Do you know what type of terrain it has there?
A It is quite steep.
MR. McCARREY: Your Honor, I am unable to hear the [112] witness.
THE COURT: The answer was, "quite steep."
MR. McCARREY: Thank you.

BY MR. MAFFEI:

Q When you viewed the area and viewed the roadway, would you be able to state whether or not there is any other place or area where the road could be built so that it could be completed to Glen Alps, other than where it is now?
A I felt there was.
Q Where was that?
A Well, I would say it would be optional. The roadway could come farther to the east and could go up the other side of this little drainage place here (indicating) or across the creek down here somewhere. It would not be practical to put a road any farther east on this hillside. It could fall most anywhere within the area here until you get into the steep contours, but this was not necessarily the only route to follow. Perhaps it was as good as any other.
Q The areas you designate are all across Mrs. Tabbytite's property; is that correct?

A I thought you had reference to Mrs. Tabbytite's property. You mean in general, any other way to serve Glan Alps?
Q Yes, other than going through Mrs. Tabbytite's property.
A I felt at the time there was an alternative to build a road on a moderate contour back here (indicating). It would be [113] longer and be more expensive. I think that is a question of degree. It could be done at a higher or a slightly higher expense, in my layman's opinion. I don't have any information as an engineer on what the soil conditions are, but the slope would not be unreasonable.
Q That would be going around that—whatever it is there, knob or hillside?
A That would be continuing up here at a moderate rate and switching back here (indicating). This is not a bad grade. I have been all over here on a motorcycle. I know the country quite well. In fact, there is a road down there, down through here now, a trail.
Q You may resume the stand. Do you know who owns the property on the west of Glen Alps, on the east of Glen Alps and bordering the east line of Mrs. Tabbytite's property?
A I believe it is all state land on the east.
Q Do you know whether or not the state now allows vehicular traffic in that part?
A I don't know what the current regulations are. I don't think they are established. They are still going through the hearing stage.
MR. MAFFEI: I have nothing further. No further questions.
THE COURT: Mr. McCarrey?
MR. McCARREY: Just two, your Honor.

[114] CROSS EXAMINATION

BY MR. McCARREY:

Q You indicated, Mr. Wakeland, that the road, were it constructed to avoid coming across Mrs. Tabbytite's property, would be somewhat longer in serving Glan Alps than it is now as so constructed. Could you tell us approximately how much longer it would be?

A No, I could not.

Q You also indicated, Mr. Wakeland, that it would cost more to build it on this longer route. Do you have an opinion as to how much more it would cost?

A No, I do not.

Q In your experience as an appraiser, have you subdiveded property?

A No, I don't think so.

Q Well, you must have some background or knowledge to act as an appraiser, since you have also indicated the highest and best use would be a subdivision for small tracts; is that correct?

A We work with them constantly.

Q Do you know of any other route that you could recommend to the Court and counsel that road could take to better improve the Tabbytite property for a subdivision than that one which is now constructed?

A Yes. I might point out that I pointed that out in my report. [115]It tends to be wasteful of a little of her property. The general alignment, I think, serves a subdivision. There are some minor problems. You will notice at the southeast corner of the property the road cuts back into it. There is no benefit to the subject property there. It should have either gone below a reasonable site or missed all together. That is wasting part of the property right there. And there is a couple other minor adjustments that might be made in that road to better serve a potential subdivision, but in general the alignment appears about what a person might have put in there if they were subdividing.

Q Mr. Wakeland, assuming that you would construct another road to serve the area, as to better utilize the

entire property, would that proposed road cost more than what the original road cost to get in there?

A I don't know. I am not an engineer. We don't have a route surveyed. I don't know whether a right of way is practical or not. I did not examine that aspect.

Q So then you have to further qualify your answer by stating that maybe the cost of the new road to better serve the property would be more than the increased value of the property; is that a logical conclusion?

A Would you restate that again?

Q Well, assuming that you constructed another road that would better serve the property than the one now constructed, as [116] you indicated, without the knowledge as to what the additional road may cost, isn't it possible and probable that the cost of the new road into the property would exceed the increased value to the property were it placed in another place?

A Which part are you speaking of?

Q You testified that, as I recall, the road did not serve the southeast corner. Now, this is not—this is south and this is east (indicating). You are referring to down here?

A No, the extreme southeast corner. There is only one.

Q This one?

A That is southwest.

Q This one?

A Yes.

Q Now, with that in mind, since you don't know what it would cost to construct another road in to serve this area as indicated, isn't it possible and probable that the cost of constructing a road so it could serve this area might exceed the increased value to the property by having a road in to it?

A (Pause)

Q You don't know?

A I don't understand the question, let alone know the answer to it.

MR. McCARREY: Very well, no further questions.

[117] MR. LEKISCH: No questions.

THE COURT: Anything further, Mr. Petersen?

MR. PETERSEN: I have nothing further, your Honor.

MS. SHORT: Nothing further, your Honor.

THE COURT: You may step down.

MR. PETERSEN: May Mr. Wakeland be excused from further attendance, your Honor?

THE COURT: Yes, you may be excused. Be sure to leave the exhibits.

* * * *

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

No. 61-60

IN THE MATTER OF THE INCORPORATION OF THE CITY OF GLEN ALPS, ALASKA, AS A MUNICIPAL CORPORATION OF THE THIRD CLASS

ORDER OF INCORPORATION

This matter came on for hearing at Anchorage, Alaska, on the 4th day of May, 1961, before the Honorable James M. Fitzgerald, Superior Court Judge. A certificate of the result of election having been filed disclosing that a majority of the qualified electors favored incorporation, and setting forth the results of the election of trustees, and an affidavit having been filed disclosing that notice of election had been given according to law, it is

DECLARED that the following described community be, and it hereby is, incorporated as the CITY of GLEN ALPS, a municipal corporation of the third class. The boundaries of the said City are as follows:

> All of the whole Section 30, Township 12 North, Range 2 West, Seward Meridian, Alaska, more particularly described as follows:
>
> Starting at an iron pipe with brass cap, which is the common corner between Sections 25 and 26 of Township 12 North, Range 3 West, Seward Meridian, Alaska, and Sections 30 and 31 of Township 12 North, Range 2 West, Seward Meridian, Alaska, and which is 400 chains South of latitude 61° 09′ 49″ North and longitude 149° 43′ 06.5″ West; thence South 89° 58′ East, a distance of 75.86 chains to a

iron pipe with brass cap, which is the common corner between Sections 29, 30, 31 and 32, Township 12 North, Range 2 West, Seward Meridian; thence North 0° 08′ West, 80 chains to an iron pipe with brass cap, which is the common corner between Sections 19, 20, 29, and 30, Township 12 North, Range 2 West, Third Meridian; thence North 89° 54′ West, a distance of 75.68 chains, to an iron pipe with brass cap, which is the common corner between Sections 24 and 25 of Township 12 North, Range 3 West, Seward Meridian, and Sections 19 and 20 of Township 12 North, Range 2 West, Seward Meridian; thence in a Southerly direction, a distance of 80 chains to the point of beginning, which area contains approximately 606.18 acres.

In accordance with the Certificate of Election Judges it is

DECLARED that the following, having received the highest number of votes for trustee, are elected to such office:

Craig Thomas
Glenn M. Clarke
Donald Spaulding
Howard Murray
Miriam Clarke

DATED at Anchorage, Alaska, the 8th day of June, 1961.

/s/ James M. Fitzgerald
JAMES M. FITZGERALD
Superior Court Judge
Third Judicial District
Anchorage, Alaska

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

ATTEST:

/s/ Jo Hare 8/4/76
WAYNE W. WOLFE
Clerk—Trial Courts
State of Alaska
At Anchorage

Municipality of Anchorage
Department of Law
Richard W. Garnett
Municipal Attorney
Richard A. Weinig
Assistant Municipal Attorney
630 West 5th Avenue
Anchorage, Alaska 99501

[Filed Aug. 6, 1976]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

A-69-69 Civil

UNITED STATES OF AMERICA, PLAINTIFF

BERTHA MAE TABBYTITE, INTERVENOR

GLEN M. CLARKE, ET AL., DEFENDANTS

AFFIDAVIT OF DAVID McCLELLAND

STATE OF ALASKA)
THIRD DISTRICT) ss.

I, DAVID McCLELLAND, being duly sworn do attest to the following things:

1. I am employed by the Municipality of Anchorage as Maintenance Operations Manager of Public Works.

2. Since unification, the Municipality of Anchorage has maintained the road from Upper Huffman to what is known as Glen Alps as a service area road of the Municipality of Anchorage. This includes the road within Section 30 which crosses Mrs. Tabbytite's property

and which was maintained and used as a public roadway by the City of Glen Alps prior to unification.

DATED this 6 day of August, 1976.

/s/ David McClelland
DAVID MCCLELLAND

SUBSCRIBED AND SWORN to before me this 6th day of August, 1976.

/s/ Richard A. [Illegible]
Notary Public in and
for Alaska

My Commission Expires:
11/6/76

Brief for the United States 2-3, *United States* v. *Clarke*, No. 77-2571 (9th Cir.)

QUESTION PRESENTED

Whether a federal statute authorizing state condemnation of Indian trust allotment land permits the state to dispense with formal condemnation proceedings and simply occupy the land.

STATUTE INVOLVED

Section 3 of the Indian Appropriation Act of March 3, 1901, 31 Stat. 1058, 1084, 25 U.S.C. 357, provides in part:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

STATEMENT

The United States, attempting to enforce this Court's mandate in *United States* v. *Clarke*, 529 F.2d 984 (1976), sought injunctive relief closing a trespass road across an Indian trust allotment unless the Municipality of Anchorage filed a condemnation action, taking the land (Appendix A to this brief, p. 1). The district court denied the injunction. It held that the Municipality of Anchorage had condemned the land by occupying it, and that the Municipality's only remaining liability was for monetary claims of the Indian allottee when and if she chose to sue the Municipality for inverse condemnation (Appendix A to this brief, pp. 2-3).

The facts in this case are set out in this Court's opinion in *United States* v. *Clarke*, *supra*, 529 F.2d at 985-986. They are, that in 1958 Glen Clarke, to gain access to his 80-acre homestead, unilaterally and illegally constructed a road across the land of Bertha Mae Tabbytite, which land is now held by Tabbytite under an Indian

trust allotment patent.[1] Beginning in 1961, Clarke subdivided his land into 40 parcels. Clarke and his successors have been using the road ever since. An over ten-year effort by Tabbytite and the United States to close the road, or have it acquired and paid for by eminent domain has been unsuccessful to date. Anchorage claims to be occupying the road now, though no specific document or physical act is relied on to support the assertion.

There is no dispute but that federal law, Section 3 of the Indian Appropriation Act of 1901, 31 Stat. 1058, 1084, 25 U.S.C. 357, authorizes the State of Alaska (or here its authorized political subdivision, the Municipality of Anchorage) to condemn that portion of the Tabbytite allotment necessary for the road. Anchorage refused to file a formal condemnation action, asserting that its occupation of the road constitutes inverse condemnation. The district court agreed that inverse condemnation by occupation satisfied the Indian Appropriation Act of 1901, *supra*, 25 U.S.C. 357. The United States seeks to have the road closed unless a formal condemnation action is brought. Most immediately at stake is the date of taking (which is the date of valuation) of the land, which may make a significant difference in the size of the award to Tabbytite if Anchorage actually does condemn the land. Also at issue is the speed with which Tabbytite obtains any visible relief.

---

[1] As set out in this Court's 1976 opinion, at the time the road was first cut, Tabbytite was in possession as a homestead entryman. She later elected to take the land under an Indian trust allotment because of Clarke's frequent contests of her patent applications.

SUPREME COURT OF THE UNITED STATES

No. 78-1693

UNITED STATES, PETITIONER

v.

GLEN M. CLARKE, ET AL.

ORDER ALLOWING CERTIORARI

Filed October 1, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 304846 117

In the Supreme Court of the United States

OCTOBER TERM, 1978

Supreme Court, U. S.
FILED
JUL 11 1979
MICHAEL RODAK, JR., CLERK

No. 78-1693

UNITED STATES OF AMERICA

v.

GLEN M. CLARKE, ET AL.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

MUNICIPALITY OF
ANCHORAGE
Theodore D. Berns
Municipal Attorney

By R. A. Weinig
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TABLE OF CASES

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The Municipality of Anchorage opposes the Petition for a Writ of Certiorari and requests that this Court decline to review the Judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Municipality of Anchorage concurs with the treatment of this issue by the United States.

JURISDICTION

The Municipality of Anchorage concurs with treatment of this issue by the United States.

STATUTES INVOLVED

Section 3 of the Indian Appropriation Act of March 3, 1901, 31 Stat. 1084, 25 U.S.C. 357, provides in pertinent part:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

QUESTION PRESENTED

Did the Court of Appeals for the Ninth Circuit err in holding that if the laws of the state allow lands to be taken for public purpose through inverse condemnation or a taking in the nature of inverse condemnation, as well as by formal condemnation proceedings which precede the taking, 25 U.S.C.A. § 357 allows lands allotted in severalty to Indians to be condemned for public purpose through inverse condemnation or taking in the nature of inverse con-

demnation, as well as by formal condemnation proceedings?

STATEMENT OF THE CASE

The United States attempts to categorize the controversy concerning the roadway across Mrs. Tabbytite's land as a feud between two homesteaders on a remote mountain top in frozen Alaska; the principal issue, seemingly, whether one homesteader, Clark, could obtain the right to maintain a road to his homestead by continued trespass across the lands of his neighbor. This is misleading. The real issue before this court is whether a road which was heavily used as a public city street wholly within city boundaries between 1961 and 1975, indeed the main street of the city, and a publicly maintained municipal roadway since 1975 within the Municipality of Anchorage, a modern city encompassing at least half of the population of the State of Alaska, has been taken for public use through inverse condemnation or taking in the nature of inverse condemnation.

UNDISPUTED ISSUES OF FACT

1. Glen Alps was incorporated as a third-class city by order of the Superior Court, Third Judicial District, Alaska Case No. 61-60, on June 8, 1961. It encompassed all of Section 30, Township 12 North, Range 2 West. (A certified copy of the Order is found at R: 61-62).

2. Immediately after incorporation, the City maintained and used the road crossing Section 30, including that portion crossing Mrs. Tabbytite's property, as a public road; snow plowing it in the winter and grading it in the summer. (TR: 69). The road crossing Mrs. Tabbytite's

property was fully within Section 30, the City boundaries. (Plaintiff's Exhibit 8).

3. Between 1955 and 1966, Mrs. Tabbytite was a homestead entrywoman without patent. On February 24, 1966, she relinquished her homestead rights. (Plaintiff's Exhibit 5). On June 9, 1966, she was granted an Indian allotment. (Original Record: 239; Plaintiff's Exhibit 7).

4. The road across Mrs. Tabbytite's land was maintained and used as a public, city road between the time of the City's incorporation in 1961 until unification in September, 1975. It was the main street of the City. (TR: 222-223, 230, 238).

5. Prior to September 16, 1975, the City of Glen Alps was situated within the geographic boundaries of the Greater Anchorage Area Borough. Other cities existing within those boundaries were the City of Anchorage, a home rule city, and the City of Girdwood, a first-class city, organized under the laws of the State of Alaska. The Greater Anchorage Area Borough was a municipal corporation organized under the laws of the State of Alaska and constituted a form of regional government, roughly an analagous to a county.

On September 9, 1965, the voters approved a home rule charter which unified all existing governments into a single home rule entity and dissolved the former cities and the Greater Anchorage Area Borough. The election results were certified on September 16, 1975. Such action was taken pursuant to the Alaska Statutes.

Pursuant to these provisions, as well as the Anchorage Municipal Charter which was enacted on September 16, 1975, the unified government succeeded to all rights, titles,

actions, suits, franchises, contracts and liabilities of the former cities and borough. The former cities, including the City of Glen Alps, became service areas within the Municipality for provision of services formerly provided within their boundaries. (Motion requesting substitution of Municipality of Anchorage for City of Glen Alps as a defendant, Memorandum in Support of Motion to substitute Municipality of Anchorage for defendant City of Glen Alps, Affidavit of Richard A. Weinig, Entry of Appearance of Municipality of Anchorage, Affidavit of Phyllis Eileen Banks, Home Rule Charter for the Municipality of Anchorage, Anchorage Assembly minutes of September 16, 1975, filed with the Ninth Circuit Court of Appeals on March 15, 1976, in No. 74-1659).

6. Since unification on September 16, 1975, the road in question has been maintained and used as a public road of the Municipality of Anchorage. (Affidavit of David McClelland, R: 63).

7. The United States conceded, on Page 3 of Appellant's Brief to the Ninth Circuit Court of Appeals:

> There is no dispute but that federal law, Section 3 of the Indian Appropriation Act of 1901, 31 Stat. 1058, 1084, 25 U.S.C. 357, authorizes the state of Alaska (or here its authorized political subdivision, the Municipality of Anchorage) to condemn that portion of the Tabbytite allotment necessary for the road.

ISSUE OF LAW

Since Alaska case law allows condemnation by formal condemnation proceedings *or* a taking in inverse condemnation *or* a taking in the nature of inverse condemnation does a taking by the Municipality of Anchorage for public

purposes through inverse condemnation or in the nature of inverse condemnation satisfy the statutory authorization to condemn lands allotted in severalty to Indians contained in 25 U.S.C.A. § 357? If so, the Municipality of Anchorage is eager to proceed to trial in this action, upon the issues of what just compensation is due to Mrs. Tabbytite and of trespass damages which may have been incurred prior to the date of taking. Indeed, it has been willing to do so since 1976. (R: 30, 60).

ARGUMENT

CRITERIA OF SUPREME COURT RULE 19

The Ninth Circuit Court of Appeals judgment in this case hardly meets the criteria which would warrant issuance of a Writ of Certiorari set forth in Supreme Court Rule 19:

1. It is not a judgment in which a state court has decided a federal question of substance.

2. ,It is not a judgment from a court of appeals which is in conflict with any other circuit.

3. It does not involve an important state question in a way in conflict with applicable state law.

4. It does not deal with a compelling issue of federal law "which has not been, but should be, settled by this court". Rather, it involves the simple interpretation of an unambiguous statute (25 U.S.C.A. § 357) and well established federal and Alaska law concerning takings in the nature of inverse condemnation. *Myers v. United States,* 323 F.2d 580, 582-3 (9th Circuit 1973); *State Department of Highways v. Crosby,* 410 P.2d 724, 728-29 (Alaska 1966); *Wickwire v. City and Borough of Juneau,*

557 P.2d 783 (Alaska 1976); See *Hurley v. Kincaid,* 285 U.S. 95, 104-105 (1932).

5. The Ninth Circuit's opinion is not in conflict with applicable decisions of this Court.

6. Nor has the Ninth Circuit Court of Appeals "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

ARGUMENT ON THE MERITS

The Municipality of Anchorage concurs fully with the Ninth Circuit's opinion in this case which is reported at 590 F.2d 465 (1979).

CONCLUSION

The petition for a writ of Certiorari should be denied.

Respectfully submitted,

THEODORE D. BERNS
Municipal Attorney

By R. A. Weinig

Richard A. Weinig
Assistant Municipal
Attorney

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v. No. 77-2571
OPINION

GLEN M. CLARKE, et al.,

Appellees,

Appeal from the United States District Court
for the District of Alaska

Before: WRIGHT, KENNEDY, and TANG, Circuit Judges.

KENNEDY, CIRCUIT JUDGE:

The United States filed this trespass suit as the owner in fee title of property held in trust after its patent to an Indian by allotment. See U.S.C. §§ 331-332. A complete background of the case is set forth in our earlier opinion, *United States v. Clarke,* 529 F.2d 984 (9th Cir. 1976). The dispute concerns a road that was built on property of the Indian owner by a private party. The private owner's in-

terest in the road later was transferred to a political subdivision of the State of Alaska.

In this phase of the proceedings, the United States sought in injunction against use of the road, claiming that the State of Alaska or a political subdivision may not acquire an interest in Indian lands held in trust except by eminent domain and that an injunction should be granted until eminent domain proceedings are commenced. The trial court denied the injunction, reasoning that the land had been the subject of an inverse taking and the public has the right to use the road after its acquisition by this means, the property owner being limited to an action for compensation resulting from inverse condemnation. The court granted partial summary judgment and denied injunctive relief, and the latter ruling is the subject of this appeal.[1]

A state is allowed by federal statute to take Indian land by condemnation, 25 U.S.C. § 357. The sole issue on appeal is whether or not the statute extends to takings by inverse condemnation as well as by the affirmative exercise of the eminent domain power. We agree with the district court that the statute permits a state to take Indian land by paying compensation in an inverse condemnation action.

The statute in question provides: "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be

[1]The appellees seek review of the district court's denial of an earlier motion for partial summary judgment. Assuming the order was an appealable one, a timely notice of appeal was not filed. Therefore, the propriety of this order will not be addressed.

condemned, and the money awarded as damages shall be paid to the allottee." The argument of the Government that the statute does not include inverse takings is based principally on *Minnesota v. United States,* 305 U.S. 382 (1939). There the Supreme Court held that the United States is an indispensable party in state actions to condemn any trust property and that such actions must be brought exclusively in the federal courts. We think that case is simply inapposite to the issue before us. There was no occasion there for the Court to consider the propriety of inverse condemnation suits, since the eminent domain action was instituted by the state. The reason for requiring the condemnation suit to be heard in a federal court is irrelevant to whether the United States may, on behalf of the Indian owner, maintain an inverse condemnation action. The Court noted that Indian land under trust allotment is a subject within the exclusive control of the federal government, and that "the judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts." Id. at 389 (footnote omitted). Whether the proceeding is for inverse condemnation or for eminent domain, the federal court may maintain control over the action to comply with the policies of *Minnesota.*

We think once the taking has been accomplished by the state it serves little purpose to interpret the statute to refuse to permit an inverse condemnation suit to be maintained on the grounds that the state should have filed an eminent domain action prior to the taking. As the Alaska Supreme Court noted in an analogous situation:

> The property has already been taken. It would serve no useful purpose to insist now that the state must in-

> itiate a condemnation action and take the initial steps required by law and rule as a condition to the exercise of its power of eminent domain. What is at issue here is the matter of awarding appellees just compensation. Such compensation may be determined in this proceeding, utilizing so far as practicable the statutory requirements and procedural steps relating to the condemnation action, as well as it could be determined in a separate condemnation action to be instituted by the state. Since the evident purpose of the injunction was to require the state, if it chose to utilize appellees' property, to institute a separate condemnation action to acquire such property, and since we have held that such action is unnecessary, the injunction was not appropriate and should be dissolved.

Department of Highways v. Crosby, 410 P.2d 724, 729 (Alaska 1966).

The Government argues that the statute permitting condemnation should be limited to direct condemnation to avoid clouding title to trust lands, thus increasing protection for Indian allottees. It suggests that such clouding will occur any time the state or a political subdivision trespasses upon the property as, such in this case, by building a road across it. We do not think this a persuasive reason for accepting such limited interpretation of the statute. To us it seems a contradiction to deny Indian beneficial owners a cause of action for damages under the guise of protecting their rights. Allowing inverse condemnation suits will encourage states and political subdivisions to act with more circumspection, not less, when governmental activities conflict with ownership rights of Indian

trust lands. And our holding certainly does not prevent the United States and the allottee from seeking immediate relief from unlawful intrusions upon land, whether the intrusion is done by trespass of a private or public entity.

The United States further contends that our holding will require it to make frequent and expensive inspections of these lands for possible acts of inverse condemnation. We think, however, that if an intrusion is of such severity that it constitutes an inverse taking the matter will come to the attention of the Indian allottee and the Government.

Congress had declared that the taking of trust lands for public use is to be governed by the laws of the state in which the property is found. We see no reason to ignore this mandate simply because the taking is reviewed in an inverse condemnation action rather than by a direct condemnation suit.

There appears to be unresolved questions in this case, including, among others, the date and extent of the taking and the operation of the applicable statute of limitations. These matters remain before the lower court. We hold only that section 357 of 25 U.S.C. does not preclude actions against states or their political subdivision, according to the law of the state, for inverse condemnation. Accordingly, it does not appear that the plaintiff will prevail in its prayer for injunctive relief and the district court was correct to deny the injunction pending the suit.

The order denying the injunction is affirmed and the case is remanded for further proceedings.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

BERTHA MAE TABBYTITE,

Intervenor, No. A-69-69

GLEN M. CLARKE, et al., CIVIL

Defendants.

MEMORANDUM AND ORDER

THIS CAUSE comes before the court on the Municipality's second motion for partial summary judgment. The issue presented is whether the use of plaintiff's land without the benefit of formal condemnation proceedings is proper under the theory of inverse condemnation to comport with 25 U.S.C. § 357. As the court holds that such a condemnation sufficiently fulfills the mandate of that statute, it need not reach several other issues raised by the motions.

The facts of the case show that the Municipality of Anchorage as a successor in interest to the City of Glen Alps has used a portion of the plaintiff's land for public pur-

poses. This use has taken place without the benefit of formal condemnation proceedings. The plaintiff seeks, *inter alia,* an injunction which will prohibit such use until a formal condemnation has occurred. The Municipality asserts that plaintiff's right to sue for inverse condemnation precludes such an injunction.

The court first turns to the statutory authority for the Municipality's claim of inverse condemnation. 25 U.S.C. §357 states:

> "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned ..."

The Municipality contends that a taking without formal condemnation proceedings is a proper condemnation in Alaska and may be utilized under this statute. It is clear from the wording of the statute that state law is to govern the propriety of the condemnation proceedings. *Necodemus v. Washington Water Power Co.,* 264 F.2d 614, 617 (9th Cir. 1959). Under Alaska law the acts of the Municipality were in the nature of inverse condemnation. *State, Department of Highways v. Crosby,* 410 P.2d 724, 728-29 (1966). It is well settled in Alaska that a taking under such circumstance is a proper exercise of the power of eminent domain and that only the failure to provide just compensation is unlawful. *Id.* at 728, see also 6A, *Nichols on Eminent Domain,* § 28.3, p. 28-84. The remedy of an injunction, therefore, is barred as the suit for damages is exclusive. *Id.* at 728-29; *Wickwire v. Juneau,* Ak. Sup. Ct. Slip op. at 3 (December 6, 1976); see also *Nichols supra* at 28-85. Such a construction is consistent

with the apparent intent of this statute which puts Indian lands on the same footing as other lands with respect to condemnation proceedings.

The plaintiff's assertion that *Minnesota v. United States,* 305 U.S. 32 (1939) requires a formal condemnation proceeding is not well taken. The issue in that case was a narrow jurisdictional question and the rational is not applicable to the present action.

Although the plaintiff is relegated to her action for damages from the inverse condemnation she is also entitled to her common law trespass damages for the use of lands prior to unification. *Cf. Nichols, supra,* at 28-74 & 28-80.

Accordingly, IT IS SO ORDERED.

THAT defendant's motion for partial summary judgment is granted.

DATED at Anchorage, Alaska, this 7th day of April, 1977.

James A. von der Heydt
United States District Judge

cc: United States Attorney
Municipal Attorney
Bertha Mae Tabbytite, Vincent Vitale
Randall E. Farleigh
J. L. McCarrey, Jr.
Albert Maffei
Croft, Thurlow and Loutrel
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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 78-1693

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

GLEN M. CLARKE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 590 F.2d 765. The opinion of the district court (Pet. App. D) is unreported. The opinion of the court of appeals on a previous appeal (Pet. App. E) is reported at 529 F.2d 984. The district court's prior opinion (Pet. App. F) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on January 15, 1979. By order of April 10, 1979, Mr. Justice Rehnquist extended the time within which to file a petition for certiorari to

and including May 10, 1979. The petition was filed on May 10, 1979, and was granted on October 1, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 25 U.S.C. 357 authorizes a state or local government to "condemn" allotted Indian trust lands by physical occupation.

STATUTES INVOLVED

Section 3 of the Indian Appropriation Act of March 3, 1901, ch. 832, 31 Stat. 1084, 25 U.S.C. 357, provides in pertinent part:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Section 1 of the Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304, 28 U.S.C. 2415, provides in pertinent part:

> § 2415. Time for commencing actions brought by the United States
>
> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six

> years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: * * * *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued. * * *.
>
> (b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That an action to recover damages resulting from a trespass on lands of the United States * * * may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues * * *.
>
> (c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.
>
> * * * * *
>
> (f) The provisions of this section shall not prevent the assertion, in an action against the

United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. * * *.

STATEMENT

1. The chronology of this case begins in 1954 after Bertha Mae Tabbytite had settled on the land in question, some 160 acres in the Chugach Mountains, southeast of Anchorage, Alaska. Although an American Indian entitled to a special allotment of public land (see 25 U.S.C. 334, 336), Mrs. Tabbytite initially sought to perfect a claim under the homestead laws. She filed her first application in 1954 and refiled two years later (Pet. App. 12a). In June 1958 Glen Clarke and his wife applied for a homestead on an adjoining 80 acres and two months later constructed a road across Tabbytite's land (Pet. App. 12a, 17a). They obtained no easement for the road (Pet. App. 18a) and it is now settled that the road could not be justified as a "way of necessity" (Pet. App. 13a-15a).

The Clarkes repeatedly contested Tabbytite's homestead application (Pet. App. 12a, 17a). They, however, secured a patent in 1961, and subdivided their acreage into 40 lots. That same year the area was incorporated as part of a third class city, Glen Alps

(Pet. App. 12a, 17a).[1] Mrs. Tabbytite, on the other hand, was unsuccessful both in her efforts to prevent the continuing trespass over her land (Pet. App. 13a) and in her several attempts to obtain a homestead patent (Pet. App. 12a ,17a). Ultimately, in 1966, she agreed to accept a restricted trust patent to the 160 acres as an Indian allotment (Pet. App. 12a-13a, 17a). As a consequence, Mrs. Tabbytite may neither sell nor encumber the land during the life of the trust, which may be extended without her consent. Meanwhile legal title remains in the United States. 25 U.S.C. 348. In 1969, the United States filed the present action to enjoin the use of the road across the Tabbytite allotment and for damages.

2. By an order entered in October 1973, the district court awarded damages for trespass but denied the injunction (Pet. App. 19a-21a). The court concluded that the road was "a way of necessity" and that closing the road would cause undue "hardship" to the defendants (Pet. App. 18a-19a). That determination was reversed on appeal and the case was remanded (Pet. App. 11a-15a). However, this was not to be the end of the matter.

By this point, February 1976, the Municipality of Anchorage had annexed Glen Alps and apparently taken over the road crossing the Tabbytite allotment

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[1] In an opinion dated November 9, 1976 (Br. of Anchorage on Appeal in No. 77-2571, Exh. A), the district court held that as a third class city, Glen Alps lacked the power of eminent domain and therefore could not, prior to unification with Anchorage, have effected a taking.

(Pet. App. 8a). On remand, the Municipality entered the proceedings and opposed the injunction on the ground that it had effectively exercised its power of eminent domain by "inverse condemnation" (Pet. App. 8a-9a). The United States argued that the federal statute invoked for consent to condemn an Indian allotment held in trust did not authorize inverse condemnation. The district court rejected the government's submission and relegated Mrs. Tabbytite to an action for just compensation (Pet. App. 8a-10a). The court of appeals agreed and affirmed (Pet. App. 1a-5a).

SUMMARY OF ARGUMENT

Land allotted in trust to Indians cannot be condemned by mere physical seizure. When 25 U.S.C. 357 was enacted seventy-eight years ago, the term condemnation signified a judicial or quasi-judicial proceeding brought by a condemnor against the owner of the desired property. Both federal and state courts entertained proceedings in equity to recover land from states, railroads and the like who sought to occupy the land without instituting condemnation proceedings. This is not to say that governmental entities could not or cannot acquire property by means other than condemnation or purchase. Takings occur whenever the government through inadvertence or mistake occupies or destroys another's property. But such takings by occupation or seizure were not, and are not today, the legal equivalent of condemnation proceedings. And they are not encompassed by Section 357.

The court of appeals' reading of Section 357 as authorizing takings by seizure would lead to illogical results. If a state commences a proceeding to condemn an Indian trust allotment, the United States is an indispensible party. *Minnesota* v. *United States*, 305 U.S. 382 (1939). Yet, if takings by seizure were permitted, allotted land could be acquired without the government even becoming aware of the taking, much less having an opportunity to challenge whether it is authorized and the extent to which it is necessary. Moreover, allotted lands could be acquired by what amounts to adverse possession. A state could acquire such lands, *inter alia*, by remaining in possession until an action for damages becomes time-barred, thus avoiding payment of any compensation whatsoever. This is at odds with a statute providing in effect that the running of a statute of limitations cannot extinguish the United States' title to land (28 U.S.C. 2415 (c)), which, in a case like this one, presumably carries with it the right to place restrictions on alienation and encumbrances. Furthermore, under the decision below Indian allottees could well be barred by the Eleventh Amendment from recovering compensation for seized land where the state is the would-be condemnor and the allottee in his or her own right brings the "inverse condemnation" proceeding.

Finally, if left undisturbed, the decision below would impose a substantial burden on the United States in its role as trustee of Indian lands, and an even greater burden on the Indians themselves. The ultimate hardship would be, of course, the loss of

land without any compensation. That is a very real possibility for thousands of Indians who must discover when a state or a municipality has occupied part of an allotment, determine whether a compensable taking has occurred, decide how to proceed to protect their interests, locate counsel, and commence an action for just compensation before it is time-barred. This is no mean task since Indians frequently do not reside on their allotments, allotments are often remote, boundaries are uncertain, and counsel is not always available.

Even allottees who managed to bring timely suits for just compensation would be disadvantaged by the decision below. Their recovery would be based on the value of their land at the time of the state's entry, rather than at the time compensation is determined. The same factors that would cause some allottees to lose their right to compensation altogether would delay others to the point that the discrepancy in recovery would be substantial.

The United States of course has an obligation as trustee to guide Indian allottees through this legal thicket. However, as this Court has recognized, the government "is faced 'with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments,'" *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968), quoting H.R. Rep. No. 2503, 82d Cong., 2d Sess. 23 (1952). That problem is exacerbated by a construction of Section 357 that permits states to encroach on trust lands without

apprising either the United States or the allottee, and that in fact creates substantial incentives for states to minimize the likelihood of discovery and maximize the delay in any proceeding for compensation.

ARGUMENT

25 U.S.C. 357 DOES NOT AUTHORIZE A STATE TO CONDEMN A ROAD ACROSS AN INDIAN ALLOTMENT WITHOUT BRINGING A PROCEEDING IN A UNITED STATES DISTRICT COURT

For the present, we indulge the assumption that 25 U.S.C. 357 authorizes the acquisition of a right of way for road purposes through restricted Indian land by direct judicial condemnation proceedings, and confine ourselves to the proposition that the cited statute does not permit that result to be achieved by so-called inverse condemnation.[2] Of course, if the Court accepts our submission, there will be no more occasion here to decide the correctness of that assumption than there was in *Minnesota* v. *United States*, 305 U.S.

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[2] The unilateral occupation or seizure of property followed by payment of just compensation has, in recent years, been labelled "inverse condemnation." It is perhaps more accurate to refer to this process as the inverse *of* condenmation. In a condemnation proceeding, property ordinarily is taken pursuant to a judgment and upon payment of compensation. Property inversely condemned is taken prior to any judicial proceeding and prior to the payment of compensation. A condemnation proceeding is brought by the condemnor against the property to effect a taking and acquire title. An inverse condemnation proceeding is brought, if at all, by the property owner against the government and is limited to determining just compensation.

382, 391 (1939). For that reason, we have not debated the question whether Section 357 is wholly unavailing to the would-be acquirer of a road right of way because that special matter is exclusively governed by 25 U.S.C. 311 or 25 U.S.C. 323-328. But our silence should not be understood as expressing a concluded view in opposition to the argument advanced by separate counsel on behalf of Mrs. Tabbytite.[3]

A. The Term "Condemnation" Means A Judicial Proceeding To Acquire Property Brought By An Entity Possessed Of The Power Of Eminent Domain

1. The term "condemn" is not defined in 25 U.S.C. 357 or in any other provision of the Indian Appropriation Act of March 3, 1901. Nor is there any helpful legislative history. The language that was to become Section 357 was not part of the original bill and was inserted, without comment or discussion, on the Senate floor. 34 Cong. Rec. 1448 (1901).[4] Nevertheless, we have a strong indication of congressional intent in the usage and practice of the time.[5]

[3] Mrs. Tabbytite intervened in the original proceedings in the district court (see Pet. App. 11a, 16a-17a) and has participated as a separate party ever since. Not having petitioned, she is a respondent in this Court (Rule 21(4)), albeit aligned with the United States, petitioner.

[4] Section 3 of the Act, to which the language of Section 357 was added, was discussed briefly in the House Report on H.R. 12904, H.R. Rep. No. 2064, 56th Cong., 2d Sess. 3 (1900): "Fifth. Providing for the opening of highways through like lands under State and Territorial laws *and upon the payment of compensation*" (emphasis added). The italicized phrase suggests that simultaneous compensation was

At the turn of the century, when Section 357 was enacted, it was generally understood that in order for land to be condemned, the would-be condemnor must institute a judicial proceeding. Thus, in a case similar in many important respects to that at bar, a landowner brought suit for rent and ejectment against a railroad which possessed the power of eminent domain. The railroad had occupied a right of way across the landowner's property without commencing a judicial proceeding or paying just compensation. This Court rejected the railroad's suggestion that the landowner's suit be treated as a condemnation proceeding, and gave the railroad six months in which to bring a true condemnation action or face ejectment. *Winslow* v. *Baltimore & Ohio R.R.*, 188 U.S. 646, 660-661 (1903).[6]

Similarly, the states limited condemnation to judicial proceedings, and devised various means of channelling those who sought to acquire land by physical occupation into the courts. For example, in Ohio, Wisconsin and South Carolina, a landowner could

envisoned, which is inconsistent with the concept of taking by seizure.

[5] Resort to contemporaneous usage is, of course, a well established means of divining Congressional intent. See, *e.g.*, *United States* v. *Wise*, 370 U.S. 405, 409-411 (1962).

[6] This was in line with then-prevailing federal law which allowed a suit for ejectment against federal authorities who took possession of land without bringing a condemnation proceeding. *United States* v. *Lee*, 106 U.S. 196 (1882).

bring an action to compel an occupier of land to condemn the land. *Fries* v. *Wheeling & Lake Erie Ry. Co.*, 46 N.E. 516, 520 (Ohio 1897); *Stewart* v. *Milwaukee Elec. Ry. & Lighting Co.*, 86 N.W. 163 (Wis. 1901); *Charnley* v. *Shawano Water Power & River Improvement Co.*, 85 N.W. 507, 508-509 (Wis. 1901); *Parrish* v. *Yorkville*, 79 S.E. 635, 636 (S.C. 1913). And in Illinois, a landowner could sue for ejectment, without prejudice to the possessor's right to bring a condemnation proceeding. *Russell* v. *Chicago & Milwaukee Elec. Ry. Co.*, 68 N.E. 727 (Ill. 1903).

To be sure, then as now, property was sometimes effectively taken without resort to the courts. For example, where land was inadvertently occupied or destroyed by an entity having the power of eminent domain, the property was deemed taken and just compensation had to be paid. See, *e.g.*, *United States* v. *Lynah*, 188 U.S. 445, 468-469 (1903). However, such instances were deemed truly exceptional at the turn of the century. And a sharp distinction was made between such "takings" on the one hand, and "condemnation" on the other. See, e.g., *United States* v. *Lynah*, *supra* at 462, 467, 468; see also *id.* at 478 (Brown, J., concurring).

In sum, considering the views then prevailing, it must be deemed most unlikely that Congress in 1901 meant to condone self-help when it authorized the "condemnation" of Indian allotted land.

2. Nor has the distinction between a unilateral "taking" and judicial "condemnation" been erased in

more recent times. Even today, the term "condemnation" is usually reserved for the procedure under which property is acquired by an eminent domain action filed in court. Thus, in *United States* v. *Dow*, 357 U.S. 17, 21 (1958), this Court observed that "[b]roadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings." In other words, there are two different "classes of 'taking' cases—condemnation and physical seizure * * *." *Ibid.* See also *United States* v. *Dickinson*, 331 U.S. 745, 747-748, 749 (1947).

The two classes of taking are not legally equivalent. And the practical differences remain significant. A taking by seizure offers the property owner no opportunity to challenge the authority for the taking or the extent of its necessity. Such rights are important safeguards against government overreaching and mistake, as evidenced by the fact that in the instant proceeding, the City of Glen Alps occupied the road across Mrs. Tabbytite's property for fourteen years without being entitled to exercise the power of eminent domain.

The two modes of taking also differ in terms of when title passes. A taking by seizure does not vest title in the taker. *United States* v. *Dow*, *supra*, 357 U.S. at 21-22; *United States* v. *Lynah*, *supra*, 188 U.S. at 470-471. Instead, title passes when compensa-

tion is paid or the statute of limitations runs. *Ibid.* The time elapsed between a taking by seizure and payment of compensation may, as illustrated by the instant case, span years, or even decades. On the other hand, when condemnation proceedings are instituted, the taking does not occur until judgment and therefore the taking and the vesting of title are simultaneous. This distinction leads to quite different results in terms of the valuation of property and the nature of the property interest acquired. See Point B, *infra* at 16.

The two modes of taking differ in another significant respect. In a taking by condemnation the burden is placed on the condemnor to notify the party whose property is sought and to invoke the aid of a court in determining just compensation. If the condemnor is not diligent, the property owner may retain full use of and title to his or her property. By contrast, where a taking is accomplished by seizure, the property owner loses the use of the property at the outset, has the burden of bringing an action for payment of just compensation, and runs the risk of receiving no compensation at all if the statute of limitations runs. See Point C, *supra* at 20.

Finally, Congress itself has recently distinguished between the two classes of taking in providing for the award of litigation expenses under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.* In "a proceeding instituted by a Federal agency to acquire real property by condemnation" (Section 4654(a)), the landowner may receive costs and attorneys' fees only

if the United States abandons the proceeding or is adjudged to lack authority to acquire the property. However, a landowner forced to sue for damages for a physical taking of property by the federal government is routinely entitled to an award of costs and fees (Section 4654(c)). This statutory scheme not only reflects the historic distinction between takings by condemnation and takings by seizure; it manifests a clear Congressional intent to encourage the former and discourage the latter.

The State of Alaska has likewise expressed a preference for condemnation proceedings over physical takings. In a 1967 Opinion involving damages to a landowner's property resulting from changes in the grade of a roadway, the Attorney General discussed the condemnation versus seizure question, relying in part on the same Alaska Supreme Court case as did the court below.

> A careful reading of the *Crosby* case indicates that the Supreme Court of Alaska does not give blanket approval to inverse condemnation actions. The Court relied upon the good faith of the State in not instituting a condemnation action but did not give the State carte blanche authority to ignore the provisions of both the

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[7] In *Department of Highways* v. *Crosby*, 410 P.2d 724 (Alaska 1966), the court held that where the state seized private land in the mistaken but good faith belief that a right-of-way had been reserved in the patent to the land, and where the landowners had entered into a stipulation with the state acknowledging the taking and fixing the date on which the property was to be valued for compensation purposes, it would be "unrealistic" to require the state to institute a formal condemnation proceeding. Id. at 728-729.

> Alaska statutes and constitution while appropriating private property. Thus, it can be stated that when the State believes it has taken an individual's property, the State should institute a condemnation proceeding. A property owner entitled to just compensation should never be put in the position of having to resort to inverse condemnation proceedings in order to collect his compensation.

1967 Op. Atty. Gen. No. 2.

The important differences between unilateral takings and judicial condemnation, and the policy, national and state, of preferring the more regular mode, suggest that Congress would not casually authorize either procedure indifferently. Even today, authority to "condemn" would most reasonably be read as requiring resort to the judicial process. All the more so, we may suppose, in the more formal and less hurried climate of 1901.

B. Reading 25 U.S.C. 357 To Authorize Takings By Seizure Leads To Illogical Results

1. The decision below, expanding the term condemnation to encompass takings by seizure, leads to illogical results. First, it renders nugatory qualifications placed by this Court on the right of states to proceed under Section 357. In *Minnesota* v. *United States*, 305 U.S. 382 (1939), a unanimous Court, speaking through Mr. Justice Brandeis, held that states bringing condemnation suits under Section 357 must do so in federal rather than state courts, and must join the United States as an indispensable party.

The Court concluded that there are "persuasive reasons why [Section 357] should not be construed as authorizing suit in a state court" (*id.* at 389). Yet, here a state subdivision was permitted to acquire allotted land without resort to *any* court. What is more, whereas this Court concluded that "no effective relief can be given in a proceeding to which the United States is not a party" (*id* at 386 n.1), the court of appeals in this case sanctioned a mode of taking that requires no proceeding at all and that fails even to apprise the United States that a taking has occurred.

2. Even more disturbing, the decision below would permit states, under certain circumstances, to acquire allotted lands without payment of any compensation, something that could never happen under the approach sanctioned in *Minnesota* v. *United States*.[8] Indeed, if it be lawful for a state or municipality to take possession of part of an Indian allotment, the statute of limitations presumably begins to run on the allottee's right to sue for just compensation from the time of physical occupation.[9] And if no suit is brought by the end of the limitation period, the state presumably acquires the land, free of any obligation to make payment.

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[8] Moreover, that result would seem to disappoint the express expectation of Section 357 that "the money awarded as damages shall be paid to the allottee."

[9] It is not clear whether under Section 357 state statutes of limitation govern or the federal statute (28 U.S.C. 2415) is applicable. That issue, however, is not involved here.

Such a result, however, does not tally with the rule announced in 28 U.S.C. 2415(c). That Section provides that, without regard for time limitations, the United States can bring an action "to establish the title to, or right of possession of, real or personal property." The statute was designed to assure that "no one can acquire title to Government property by adverse possession." S. Rep. No. 1328, 89th Cong., 2d Sess. 3 (1966); cf. *Texas* v. *Louisiana*, 410 U.S. 702, 714 (1973). The United States retains title to lands allotted in trust. Therefore, if 28 U.S.C. 2415 (c) is to be respected, that title cannot be extinguished by an "inverse condemnation" even if an action for just compensation is time-barred. Indeed, it is questionable whether the United States title can be extinguished even if just compensation is paid, where the government is not a party to the damages proceeding or has not had an opportunity during the course of the proceeding to challenge the taking. The continuing federal title would presumably carry with it the power to restrict alienation and limit encumbrances. Thus, even if a state acquired a possessory interest by adverse possession, it might experience difficulty in exploiting it by, for example, making utility line grants along the right of way. No such impasse can have been intended.

3. There is another statute of limitations problem created by the decision below. Where, as here, a governmental taking is "piggy-backed" onto a trespass, either by a private person or by an entity lacking authority to effect a taking, an action for trespass

can be asserted as a counterclaim in a condemnation proceeding no matter when the trespass occurred (28 U.S.C. 2415(f)). However, if takings by seizure are permitted, the burden of bringing a proceeding is on the United States and the Indian allottee, and any trespass claim must be asserted affirmatively. In such circumstances, the claim presumably would be subject to the 6¼ year statute of limitations set out in 28 U.S.C. 2415(b).

4. Finally, permitting takings by seizure would pose yet another hurdle for Indian allottees seeking just compensation. Where the entity seeking land is the state, rather than a municipality, the Eleventh Amendment might bar recovery. In condemnation proceedings no such problem exists since it is the state that invokes the aid of the courts. However, in "inverse condemnation" proceedings, the landowner must sue the state. Since there is no statutory authorization for such proceedings, the state might well prove successful in arguing that it has not consented to be sued. To surmount the obstacle, the United States would be required to act as plaintiff in every case, even though, under Section 357, "the money awarded as damages shall be paid to the allottee." Given the many competing claims on limited governmental resources, this could often delay recovery, to the prejudice of the allottee.

C. Reading 25 U.S.C. 357 To Authorize Takings By Seizure Would Impose Substantial Burdens On The Federal Government And Substantial Hardships On Indian Allottees[10]

In a condemnation proceeding, the condemnor must serve notice on the party whose land is being sought, must serve notice on the United States if allotted land is involved, must spell out the extent of the taking, must demonstrate its authority for and need for the taking, and must pay compensation before the taking occurs. To accomplish a taking by seizure, a state or municipality need only occupy the land. The burden then shifts to the landowner to discover the encroachment and do something about it.

A state may occupy part of an Indian trust allotment for years without being discovered. Indians need not reside on or make use of allotted lands, and many do not. Allotments are often quite remote. Signs of encroachment are not always obvious. A disruptive modern highway may begin as a dusty dirt road or a trail through the wild. Boundaries of allotments are often uncertain since the equitable interest of the allottee does not depend on the land being surveyed or certificated. See *Thomas S. Thorson*, 17 I.B.L.A. 326 (1974). Once an encroachment is discovered, the allottee has the burden of determining whether a compensable taking has occurred. The

[10] Such a reading would therefore run contrary to the general rule that statutes dealing with Indians are to be construed in the Indians' favor. *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976).

party in occupation may be a private trespasser, like Glen Clarke, or a public one, like Glen Alps. The occupation may be temporary, insubstantial, or inchoate. Cf. *United States* v. *Dickinson*, 331 U.S. 745 (1947).

The allottee must then determine how to proceed. If the occupier is viewed as a trespasser, the allottee might attempt, as did Mrs. Tabbytite, some form of self help such as blocking the road or otherwise impeding the occupier's use of the land. The allottee might also try to negotiate with the state or municipality, or to compel the state to negotiate with the Secretary of the Interior pursuant to 25 U.S.C. 311. Particularly when the allottee's aim is to terminate the encroachment and recover the land, a suit for just compensation would likely be his or her last resort. In sorting out these various possibilities, many Indians must overcome cultural barriers that inhibit their ability to comprehend Anglo-American concepts of property and the vagaries of our legal system. Cf. *Calista Corp.* v. *Mann*, 564 P.2d 53, 61 (Alaska 1977). Those who decide to seek legal counsel may well experience considerable difficulty in doing so, particularly in remote areas. Cf. *Aguchak* v. *Montgomery Ward Co.*, 520 P.2d 1352, 1357 (Alaska 1974).

An Indian allottee who fails to discover an encroachment promptly or who, upon discovery, pursues remedies other than a suit for just compensation runs the risk of losing his or her property by what amounts to adverse possession. Once the statute of limitations runs on a damages action, the property interest taken

by seizure passes to the state. *United States* v. *Lynah*, *supra*, 188 U.S. at 470-471. Under such circumstances, the allottee would not only lose the land; he or she would receive no compensation for it.

Allottees who manage to bring timely damages suits would, of course, receive compensation, but they too would be disadvantaged by the court of appeals' reading of Section 357. Assuming rising lands values, the inevitable delay between the date of the taking and the award of compensation [11] would result in a significant discrepancy between what the allottee would recover in a condemnation proceeding and what he or she would recover in an "inverse condemnation" proceeding.[12] For example, were a condemnation proceeding commenced against Mrs. Tabbytite today, her compensation would be based on the land's current

[11] On top of the delay inherent in discovering the taking and determining how to remedy it, ultimate recovery is subject to delays during the course of the damages proceeding. The instant proceeding, albeit not one for just compensation, has dragged on for ten years. Indeed, it is in the state's pecuniary interest to delay such proceedings during periods of inflation since the ultimate compensation is paid in depreciated dollars.

[12] This Court has recognized the appropriateness of an award of interest as a convenient measure of compensation for delay in payment. *United States* v. *Klamath Indians*, 304 U.S. 119, 123 (1938); *Jacobs* v. *United States*, 290 U.S. 13, 17 (1933); *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 306 (1923). However, such interest is designed to compensate for the landowner's loss of the use value of his or her property (*Kieselbach* v. *Commissioner*, 317 U.S. 399, 403-404 (1943), and in no way compensates for the appreciated value of the land.

value. Were the proceeds reinvested pursuant to 25 U.S.C. 409(a), equivalent substitute land could be acquired. However, were she to commence a proceeding to recover just compensation,[13] Mrs. Tabbytite's award would be based on the value of the land when Anchorage took over the road in 1975, prior to the current pipeline-induced land boom.

The Indian allottee need not, of course, take on the state single-handedly. The United States as trustee has a moral and legal obligation to protect the interests of Indian allottees. *Minnesota* v. *United States*, *supra*. See also *Board of County Comm'rs* v. *Seber*, 318 U.S. 705, 715 (1943). However, as this Court has recognized, the government "is faced 'with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments,'" *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968), quoting H.R. Rep. No. 2503, 82d Cong., 2d Sess. 23 (1952). The court of appeals' decision converts an overwhelming responsibility into an impossible burden, and should not be sustained.

[13] Presumably she could assert such a claim in the instant trespass action and thus avoid any statute of limitations problem.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1979

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UNITED STATES OF AMERICA, *Petitioner*,

v.

GLEN M. CLARKE, et al., *Respondents*.

On Writ of Certiorari from the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR BERTHA MAE TABBYTITE

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BRIEF FOR BERTHA MAE TABBYTITE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 590 F.2d 765. The opinion of the district court (Pet. App. 8a-10a) is unreported. The opinion of the court of appeals on a previous appeal (Pet. App. 11a-15a) is reported at 529 F.2d 984. The district court's prior opinion (Pet. App. 16a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a) was entered on January 15, 1979. By order of April 10, 1979, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including May 10, 1979. The petition was filed on May 10, 1979 and granted on October 1, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of . . . property, without due process of law. . . .

3(a). The first paragraph of Section 3 of the Indian Appropriations Act of March 3, 1901, 31 Stat. 1058, 1083-1084, 25 U.S.C. 319, provides:

> That the Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or

> for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages over any lines constructed under the provisions of this Act: Provided, That incorporated cities and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities.

(b) The second paragraph of Section 3 of the Indian Appropriations Act of March 3, 1901, 31 Stat. 1058, 1084, 25 U.S.C. 357, provides:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

(c) Section 4 of the Indian Appropriations Act of March 3, 1901, 31 Stat. 1058, 1084, 25 U.S.C. 311, provides:

> That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation.

4. The Act of February 5, 1948, 62 Stat. 17, the first six sections of which are codified as 25 U.S.C. 323-328, provides:

> The Secretary of the Interior be, and he is hereby, empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual

> Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.
>
> Sec. 2. No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), as amended; the Act of May 1, 1936 (49 Stat. 1250); or the Act of June 26, 1936 (49 Stat. 1967), shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indians if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.
>
> Sec. 3. No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

Sec. 4. This Act shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935 (49 Stat. 838), nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed hereby.

Sec. 5. Rights-of-way for the use of the United States may be granted under this Act upon application by the department or agency having jurisdiction over the activity for which the right-of-way is to be used.

Sec. 6. The Secretary of the Interior is hereby authorized to prescribe any necessary regulations for the purpose of administering the provisions of this Act.

Sec. 7. This Act shall not become operative until thirty days after its approval.

5. Pertinent provisions of the condemnation laws of the State of Alaska and of the United States are set forth in Appendix B to this Brief.

QUESTION PRESENTED

Whether 25 U.S.C. 357 authorizes a state or local government to "condemn" allotted Indians lands for a highway right of way by physical occupation.

STATEMENT

The United States brought this action on behalf of Bertha Mae Tabbytite, an Indian trust allottee, to enjoin defendants from trespassing on the Tabbytite allotment and to recover damages. Tabbytite intervened and is separately represented. Following adverse

decisions by the district court and the court of appeals, the United States petitioned for certiorari. Tabbytite filed a Brief supporting the Petition.

Though a respondent [Supreme Court Rule 21(4)], Tabbytite files this Brief joining the petitioner in urging reversal of the judgment of the court of appeals. Tabbytite adopts the statements of the case and the arguments set forth in the Brief of the United States. The arguments presented in this Brief are confined to matters not included in the Brief of the United States.

SUMMARY OF ARGUMENT

1. Section 357 does not authorize the acquisition of highway rights of way across allotted Indian lands by condemnation or by physical seizure because that subject is governed by a more specific provision of the same enactment, 25 U.S.C. 311. Section 311 would also be rendered insignificant and its protective provisions would easily be defeated if highway rights of way could be acquired by condemnation. Effect can be given to both Section 311 and Section 357 by limiting Section 357 to the acquisition of interests in allotted Indian lands that are not covered by more specific statutes. And the ambiguity on the face of the statute that includes both Sections 311 and 357 should be resolved in favor of the Indians, particularly in the absence of any indication of a contrary legislative intent.

2. For the same reasons, the acquisition of rights of way across Indian allotted lands should be governed by the 1948 Indian Right of Way Act, 25 U.S.C. 323-328, to the exclusion of Section 357. Further, a provision of the 1948 Act expressly saved certain other laws from repeal, but there was no mention of Section 357. And

since the policies underlying Section 357 were subsequently repudiated by Congress, the Court should adopt a construction of the two statutes that implements the objectives of the more recent legislation.

3. The applicability of Section 357 to the acquisition of highway rights of way across allotted Indian lands has remained an open question in this Court since *Minnesota* v. *United States,* 305 U.S. 382, 391 (1939). Even though the issue was not argued below, it is fairly encompassed within the question presented in the Petition and should be reached and resolved on the merits now in order to avoid even further prolongation of this 20 year dispute and decade of litigation. No useful purpose would be served by pretermitting the issue since the court of appeals has already passed on the question in another case.

4. By dispensing with notice and not providing an opportunity to be heard, governmental takings of private property by physical seizure constitute a flagrant denial of the procedural due process guarantees of the Fifth and Fourteenth Amendments. While actual, personal notice is not mandatory under all circumstances, in this case there is no justification for exercising the power of eminent domain by physical occupation. By refusing to institute judicial condemnation proceedings, Anchorage has effectively denied Tabbytite's right under Alaska law to challenge the authority, necessity and extent of the alleged taking and to protect herself against governmental mista[illegible]nd overreaching.

The constitutional issue can and should be avoided by excluding takings by physical seizure from the authority conferred by Section 357.

While this Court and the Congress have been careful to discourage takings by seizure, the decisions below provide substantial incentives for governments to dispense with condemnation proceedings. In light of its overriding obligation to deal fairly with Indians, Congress should not be presumed to have intended to authorize the taking of Indian property without providing for notice or an opportunity to be heard.

ARGUMENT

I. HIGHWAY RIGHTS OF WAY ACROSS ALLOTTED INDIAN LANDS ARE NOT SUBJECT TO JUDICIAL CONDEMNATION

The question presented in this case is whether a highway right of way through the Tabbytite allotment can be obtained pursuant to the second paragraph of Section 3 of the 1901 Indian Appropriations Act, codified as 25 U.S.C. 357. Tabbytite answers that question in the negative because, *inter alia,* the acquisition of highway rights of way through Indian allotted lands is governed exclusively by two other statutes, Section 4 of the 1901 Indian Appropriations Act, codified as 25 U.S.C. 311, and the 1948 Indian Rights of Way Act, codified as 25 U.S.C. 323-328.

A. Section 357 Does Not Apply to Highway Rights of Way Across Indian Lands Because That Subject Is Governed by Another, More Specific Provision of the Same Statute.

Section 357 was enacted as the second paragraph of Section 3 of the 1901 Indian Appropriations Act. 31 Stat. 1058, 1084, reproduced *supra* at 4. It was adopted as a floor amendment during the Senate debate.

34 Cong. Rec. 1448 (1901).[1] Section 4 of that same Act, 25 U.S.C. 311, authorizes the Secretary of the Interior

> to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation.

There is no doubt that the City of Anchorage can apply for a highway right of way through the Tabbytite allotment pursuant to Section 311. The question here is whether Section 357 provides an alternate vehicle for obtaining the same right of way without the Secretary's permission. This issue was presented and argued in *Minnesota* v. *United States,* 305 U.S. 382 (1939), but was expressly left open. 305 U.S. at 391.

Section 311 authorizes, but does not direct, the Secretary of the Interior to grant permission to state or local authorities to use allotted Indian lands for public highways "upon compliance with such requirements as he may deem necessary." The Secretary is charged with fiduciary obligations in administering allotted lands "for the sole use and benefit" of the Indian owners. 25 U.S.C. 348; *United States* v. *Mason,* 412 U.S. 391, 398 (1973); *United States* v. *Rickert,* 188 U.S. 432, 442-443 (1903). Consequently, in imposing requirements on the grant of highway rights of way, the Secretary is obli-

[1] The sparse legislative history does not illuminate any of the issues in this case.

gated to protect the interests of the Indian allottee to the maximum possible extent. If state and local authorities have the option of condemning highway rights of way pursuant to Section 357, the protection provisions afforded Indian allottees by Section 311 would be entirely defeated.

1. The canons of statutory construction support the exclusivity of the Section 311 procedure.

Several canons of statutory construction lead to the conclusion that Section 311 governs the grant of highway rights of way to the exclusion of Section 357.

First, this is a classic case for the application of that "eminently sound and vital canon that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan* v. *Itasca County,* 426 U.S. 373, 392 (1976).[2] The 1901 Indian Appropriations Act is ambiguous on its face. Section 311 can be construed as either the exclusive, or an alternative, means of acquiring highway rights of way across allotted Indian lands. In the absence of any relevant legislative history, the rule that ambiguities must be resolved in the Indians' favor is controlling.

Second, Section 311 is obviously the more specific provision, since it applies only to grants of rights of way across allotted lands to state or local authorities for public highways, whereas Section 357 permits condemnation of allotted lands "for any public purpose."

[2] This canon has equal force whether the beneficiaries of the statute are Indian tribes, Indian allottees or tribal members. Squire v. Capoeman, 351 U.S. 1, 6-7 (1956); Choate v. Trapp, 224 U.S. 665, 675 (1912). *See also* Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n.7 (1976).

In these circumstances effect must be given to the more specific part of the statute.

> However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'

MacEvoy v. *United States,* 322 U.S. 102, 107 (1944), quoting *D. Ginsberg and Son* v. *Popkin,* 285 U.S. 204, 208 (1932). *See also Morton* v. *Mancari,* 417 U.S. 535, 550-551 (1974) ("Where there is no clear indication otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.")[3]

If Section 357 is construed as an alternate means of obtaining highway rights of way across allotted Indian lands, Section 311 would be made insignificant in contravention of a third canon. *See, e.g., United States* v. *Campos-Serrano,* 404 U.S. 293, 301 and n.14 (1971). ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.")

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[3] Although Section 311 is the more specific statute because it is limited to rights of way for highways, Sections 311 and 357 are otherwise co-extensive. Section 311 authorizes the grant of permission "to the proper State or local authorities for the opening and establishment of public highways . . . ." It does not authorize rights of way for private roads, nor does it empower the Secretary to grant permission to nongovernmental entities to open and establish public highways. In these latter respects, Sections 311 and 357 are identical in scope because 357 authorizes condemnation of allotted lands for public purposes by entities clothed with the power of eminent domain under state law.

In exercising his powers under Section 311, in some instances the Secretary might require that the highway be located near the allotment's boundaries so as to minimize interference; in others it might be to the allottees' advantage to locate the highway to maximize access.[4] These and other matters, such as the design and width of the highway, were left to the Secretary's judgment. But if the highway right of way can be obtained by judicial condemnation, the delegation of power to the Secretary would be obviated. Similarly, several protective provisions of the first paragraph of Section 3 of the 1901 Indian Appropriations Act, 25 U.S.C. 319, reproduced *supra* at 2-3, which authorizes secretarial grants of rights of way across tribal and allotted lands for telephone and telegraph lines, would be rendered insignificant if those same interests could be obtained pursuant to Section 357.

Fourth, this Court has consistently construed Indian statutes in a manner that gives full effect to their protective purposes. *Wilson* v. *Omaha Indian Tribe,* —— U.S. ——, ——, 99 S. Ct. 2529, 2537, 61 L.Ed.2d 153, 166 (1979); *Smith* v. *McCullough,* 270 U.S. 456, 464-65 (1926) ("The purpose of the restrictions was to give the needed protection, and they should be construed in keeping with that purpose.")[5]

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[4] *See* Supplemental Memorandum of the United States in Minnesota v. United States at 9, cited and discussed *infra* at 15, for one instance in which a proposed highway was relocated after Interior officials expressed "considerable objection" to the originally planned location.

[5] There is no explanation in the legislative history of why Congress accorded different treatment to rights of way for highways and telephone and telegraph lines than uses of allotted lands for other public purposes. Possible reasons for this disparate treatment are readily apparent, however. Rights of way for highways and

Fifth, as stated in *Morton* v. *Mancari, supra,* 417 U.S. at 551:

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

The way to give effect to both statutes is by holding that Section 311 applies to the acquisition of highway rights of way across allotted Indian lands while Section 357 governs the acquisition of Indian allotted lands for public purposes not covered by more specific laws. *Morton* v. *Mancari, supra,* reached a similar result, giving effect to a specific statute granting an employment preference to Indians in the Indian Service while construing a general provision prohibiting discrimination by the government to apply to the employment of Indians by other government agencies.

2. Prior administrative practice and construction are not of much assistance.

The Interior Department's administration of Sections 311 and 357 has not been consistent. In the litigation that culminated in *Minnesota* v. *United States,* 305 U.S. 382 (1939), the United States took the position

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telephone and telegraph lines were probably among the most common purposes for which interests in allotted Indian lands were sought. (Railroad rights of way were covered by a prior, specific 1899 enactment, 30 Stat. 990, 25 U.S.C. 312-318, and a subsequent 1904 Act, 33 Stat. 65, 25 U.S.C. 321, authorizes secretarial grants of rights of way for oil and gas pipelines.) They are also the kinds of uses of allotted lands for public purposes that most require, and lend themselves to, protective conditions relating to their location and design. This is especially true of highways.

that highway rights of way across allotted lands could not be obtained absent compliance with Section 311. *See* United States' Brief in Opposition to Certiorari at 7-8; and Brief of the United States at 18-19, *Minnesota* v. *United States,* O.T. 1938, No. 73. Solicitor General Robert H. Jackson argued, *inter alia,* that applying the Section 357 condemnation procedure to highway rights of way across allotted lands would render Section 311 "self-contradictory" and "largely inoperative." Brief in Opposition to Certiorari, *supra,* at 8.

During oral argument in that case, this Court specifically asked to be advised about the administrative practice of the Interior Department concerning condemnation of allotted Indian lands for highway purposes. In response, the Solicitor General filed a Supplemental Memorandum, which included a detailed summary prepared by the Interior Department of its prior practice with regard to highway rights of way across allotted lands. Two instances were reported in which state or local authorities were advised that highway rights of way were governed by Section 311 and could not be obtained without the Secretary's consent. Supplemental Memorandum for the United States, *Minnesota* v. *United States,* O.T. 1938, No. 73, at 7 and 8. Several other situations were described in which highway rights of way were eventually obtained pursuant to Section 311 after condemnation actions had been contemplated or actually filed.

On the other hand, the Interior Solicitor concluded in a 1923 opinion that Section 357 and various statutes authorizing secretarial grants of rights of way across allotted lands provided alternate means of acquiring

these rights of way. 49 I.D. 396.[6] Significantly however, while the opinion refers to several such statutes, there is no mention of Section 311 or 25 U.S.C. 319, both of which were included with Section 357 in the 1901 Indian Appropriations Act.

As to more recent times, it is our understanding that the Interior Department altered its prior practice after 1940 to conform with the decision in *United States* v. *Minnesota,* 113 F.2d 770 (8th Cir. 1940), discussed *infra* at n. 9. In that case the court of appeals held that rights of way could be obtained pursuant to either Section 311 or Section 357.

Given this checkered history, prior administrative practice and construction, in and of itself, is not entitled to much consideration. *See* and *compare General Electric Co.* v. *Gilbert,* 429 U.S. 125, 140-43 (1976); and *United States* v. *Oklahoma Gas & Electric Co.,* 318 U.S. 206, 217-18 (1943). To the extent that any deference is owed, the administrative practice described in the Solicitor General's Supplemental Memorandum in *Minnesota* v. *United States, supra,* ranks highest because: (1) it was contemporaneous; (2) it "focused closely on the operative impact" of Sections 311 and 357;[7] (3) its chief competitor, the 1923 Interior Decision, was based on manifestly deficient rea-

[6] This opinion was based in part on the understanding that allotted lands that are held in trust could be condemned even in the absence of express statutory authorization. Minnesota v. United States, 305 U.S. 382 (1939), held to the contrary. The opinion also erroneously assumed that limiting Section 357 to the acquisition of interests in allotted lands for public purposes other than those that are authorized by specific enactments would result in a disfavored repeal by implication. *Compare* Morton v. Mancari, *supra,* 417 U.S. 535; and *see* the discussion *supra* at 14.

[7] *See* Weinberger v. Salfi, 422 U.S. 749, 758 n.6 (1975).

soning;[8] and (4) the more recent practice was adopted to conform with a lower court decision and therefore does not qualify as an administrative determination.

3. This Court's decision in *United States* v. *Oklahoma Gas & Electric Co.* supports the inapplicability of Section 357 to the acquisition of highway rights of way.

As previously noted, whether highway rights of way can be obtained by condemnation pursuant to Section 357 was presented, but left open, in *Minnesota* v. *United States,* 305 U.S. 382, 391 (1939).[9] Although the issue was not directly presented four years later in *United*

[8] *See,* note 6, *supra*; and Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), quoted and followed in General Electric Co. v. Gilbert, *supra,* 429 U.S. at 141-42.

[9] In that case, the Court of Appeals for the Eighth Circuit had upheld the government's position that "[w]hen . . . Section 357 is read in connection with its context, the rest of Section 3 [of the Act of March 3, 1901], 25 U.S.C.A. § 319, it becomes apparent that the provision does not and was not intended to conflict with or to withdraw the conditions laid down in section 4 of the act [25 U.S.C. 311], upon which the United States consented to proceedings to open up highways through allotted Indian lands." United States v. Minnesota, 95 F.2d 468, 472 (8th Cir. 1939).

After this Court affirmed that decision on other grounds leaving this issue open, an identical case involving another allotment came to the same court and the Eighth Circuit reversed itself. United States v. Minnesota, 113 F.2d 770 (8th Cir. 1940). In this decision, the court of appeals stated that it had previously been misled by the government's reliance on a Fourth Circuit decision which, as subsequently admitted by the United States, involved tribal rather than allotted lands. The Court also relied on administrative statements and regulations. But these did not "focus closely on the operative impact" of Sections 311 and 357. Weinberger v. Salfi, 422 U.S. 749, 758 n.6 (1975). The Court ignored the specific administrative practice summarized in the Solicitor General's Supplemental Memorandum to the Supreme Court in Minnesota v. United States. *See supra* at 15. There was no mention of the rule that a specific provision of a statute will not be nullified or controlled by

States v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206 (1943), the reasoning of that decision supports the position that Section 311 is the exclusive means of obtaining highway rights of way through allotted lands.

In *Oklahoma Gas & Electric Company*, the issue was whether the company's use of Indian allotted land for an electric service line constituted a trespass. The Secretary had granted a right of way across the allotment for a highway to the State of Oklahoma pursuant to Section 311, and the electric service line occupied land within the highway right of way with the State's permission. Section 311 expressly makes highway rights of way subject to state law. The Court held that the use of a highway right of way for an electric service line was permitted by state law, did not conflict with any federal policies, and therefore did not constitute a trespass.

The United States claimed that the right of way for the electric line across the allotted land was governed by two other statutes, 43 U.S.C. 959 and 961, which authorize secretarial grants of rights of way for electric lines across "reservations." Neither statute mentions Indian allotted lands. The Court held that these two statutes were not intended to govern rights of way over the allotted land involved in that case.

In reaching this conclusion, the Court noted that one of the right of way statutes, 43 U.S.C. 959, made tele-

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a general one or of the canon requiring that ambiguities be resolved in favor of Indians.

United States v. Minnesota, *supra*, 113 F.2d 770, was followed *in dictum* United States v. Oklahoma Gas & Electric Co., 127 F.2d 349-354 (10th Cir. 1942), *affirmed on other grounds*, 318 U.S. 206 (1943).

graph or telephone companies which availed themselves of the Act subject to rates set by the Postmaster General and also made all of the companies' property subject to purchase by the government at a value ascertained by a specific appraisal procedure. The Court held that the evident purpose of this proviso seemed to indicate that the statute was not intended to apply to allotted lands. This conclusion was reinforced by the condemnation statute, Section 357, because, the Court reasoned, if 43 U.S.C. 959 was intended to apply to allotted lands, that intent "was defeated by giving an option to obtain the same rights by condemnation under state law [pursuant to Section 357] free of [the] restrictions [in Section 959]." 318 U.S. at 214.

Seen in context, the Court's reliance on Section 357 supports the position that Section 311, not Section 357, governs highway rights of way over allotted lands. Section 311, unlike 43 U.S.C. 959, expressly applies to allotted lands. It also makes rights of way granted by the Secretary subject to "compliance with such requirements as he may deem necessary." In this latter respect, it is like 43 U.S.C. 959 in that it authorizes the imposition of conditions on the right of way that would be "defeated" if the same rights could be obtained by condemnation under state law free of such restrictions. *Oklahoma Gas & Electric Company* recognizes the incompatibility between a statute authorizing the Secretary to grant rights of way subject to restrictive conditions and a statute authorizing the acquisition of the same interest by condemnation free of conditions. In *Oklahoma Gas & Electric Company*, this reasoning led to the conclusion that 43 U.S.C. 959 does not apply to all allotted lands because allotted lands are not mentioned. In this case, the same reasoning leads

to the conclusion that highway rights of way across allotted lands are governed by Section 311 because allotted lands are expressly covered.[10]

B. The 1948 Right of Way Statute Precludes Acquisition of Rights of Way Through Allotted Lands by Condemnation.

In 1948, Congress enacted a comprehensive statute authorizing secretarial grants of rights of way "for all purposes . . . over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes . . . ." Section 1 of the Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. 323, reproduced in full *supra* at 4-6. Like Section 311, the grant of rights of way is "subject to such conditions as [the Secretary of the Interior] may impose . . . ." *Id.* Section 2 of that Act, 25 U.S.C. 324, requires "the consent of the proper tribal officials" with regard to rights of way over and across any tribal lands belonging to Indian tribes organized under certain specified statutes. With regard to allotted lands, Section 324 provides:

> Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.[11]

[10] The foregoing discussion is based on the law as it existed prior to the enactment of 25 U.S.C. 323 *et seq.* in 1948. *See, infra* at n.13.

Section 3 of the 1948 Act, 25 U.S.C. 325, requires "the payment of such compensation as the Secretary of the Interior shall determine to be just." Section 4, 25 U.S.C. 326, provides that nothing in the Act shall "amend or repeal" the Federal Water Power Act, "nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed." Section 5, 25 U.S.C. 327, authorizes the Secretary to grant rights of the way for the use of the United States, subject to the terms of the Act, upon application of other federal agencies. Section 6, 25 U.S.C. 328, empowers the Secretary to prescribe any necessary regulations for the purpose of implementing the Act.

1. The canons of statutory construction and *United States* v. *Oklahoma Gas & Electric Co.* support the exclusivity of the Section 323 *et seq.* procedures for the acquisition of rights of way across allotted lands.

Sections 323 *et seq.* were intended to provide "simplification and uniformity in the administration [of grants of rights of way for any purpose over individually and tribally owned land]." S.Rept. No. 823, 80th Cong. 2d Sess. 3 (1948). The highway right of way over the

[11] The necessity for obtaining the consent of the Indian allottee, except in specifically enumerated circumstances which are not present in this case, is also embodied in the Secretary's implementing regulations. 25 C.F.R. 161.3(b) and (c).

Tabbytite allotment is governed by this statute to the exclusion of Section 357 for all of the reasons urged in Part I-A. Sections 323 *et seq.*, like Section 311, are more specific than Section 357 because they apply only to rights of way, while Section 357 authorizes condemnation for any public purpose. Several provisions of Sections 323 *et seq.* would be rendered insignificant if highway rights of way could be obtained by condemnation pursuant to Section 357. These provisions include the Secretary's powers to prescribe conditions, to determine just compensation, and to promulgate regulations; the allottees' right to withhold consent; and the Secretary's power to grant rights of way without the allottees' consent if he finds that the grant will cause no substantial injury to the land or any owner thereof. Effect can be given to both Sections 323 *et seq.* and Section 357 by limiting Section 357 to the acquisition of all interests in allotted lands other than rights of way. Any doubts about the relationship between the two statutes should be resolved in favor of the Indians and in a manner that fully effectuates the protective purpose of Sections 323 *et seq.* And the reasoning of *United States* v. *Oklahoma Gas & Electric Co., supra,* supports the conclusion that Section 357 should not be construed in a manner that permits Sections 323 *et seq.* to be circumvented. Several of these grounds were relied upon in *Plains Electric Generation and Transmission Cooperative, Inc.* v. *Pueblo of Laguna,* 542 F.2d 1375 (10th Cir. 1976), in support of the holding that a 1926 statute authorizing the condemnation of Pueblo Indian lands was impliedly limited by Sec-

tions 323 *et seq.* so as to exclude the acquisition of rights of way.[12]

2. Section 357 was not saved from repeal by the 1948 Indian Right of Way Act.

When Congress enacted Sections 323 *et seq.* it was aware of the existence of other laws authorizing the acquisition of rights of way across Indian lands. Section 4 of the Act, 25 U.S.C. 326, addresses the relationship between Sections 323 *et seq.* and those other acts. It provides that the Act "shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 . . . nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed." Under the rule of statutory construction known as *expressio unis est exclusio alterius,* the omission of any reference to Section 357 in Section 326 is an indication that Congress did not intend to save Section 357 from repeal insofar as the acquisition of rights of way over allotted lands is concerned. *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153, 188 (1978); *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers,* 414 U.S. 453, 458 (1974); and *Plains Electric Generation and Transmission Coopera-*

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[12] In Nicodemus v. Washington Power Co., 264 F.2d 614, 618 (9th Cir. 1959), the Ninth Circuit followed United States v. Minnesota, *supra,* 113 F.2d 770, in holding that Sections 323 *et seq.* and Section 357 "offer two methods for the acquisition of an easement across allotted Indian lands." The result and reasoning of the *Plains Electric* case are plainly at odds with these prior decisions.

A subsequent Tenth Circuit decision, Transok Pipeline Co. v. Darks, 565 F.2d 1150, 1153 (1977), cites Nicodemus with approval *in dictum* without mentioning Plains Electric.

tive, Inc. v. *Pueblo of Laguna, supra,* 542 F.2d at 1380.[13] There is no contrary indication of legislative intent.[14]

3. Indian statutes of ongoing applicability should be construed so as to effectuate current congressional policies.

In the 47 years between the enactment of Section 357 and Sections 323 *et seq.*, federal Indian policy underwent radical changes. Not surprisingly, the two statutes

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[13] Section 326 also provides guidance in interpreting the relationship between the 1948 statute and prior laws authorizing the Secretary to grant rights of way for specific purposes such as Section 311. Section 326 distinguishes between the Federal Water Power Act and statutes empowering the Secretary to grant rights of way. Nothing in the 1948 statute "amends or repeals" the provisions of the Federal Water Power Act, while the other statutes authorizing secretarial grants of rights of way are saved only from "repeal." The alteration of statutes like Section 311 by the provisions of the 1948 Act is therefore permitted. As applied to this case, this means that Section 324 amends Section 311 by requiring Tabbytite's consent. *See* the Interior Department's June 19, 1978 Decision, reproduced as Appendix A to this Brief, at 3a-5a.

[14] In commenting on the proposed bill, the Interior Department stated: "Section 5 of the bill broadens existing powers of condemnation over individually owned Indian lands." S.Rep. No. 823, 80th Cong. 2d Sess. 4 (1948). Section 5 of the proposed bill is identical with Section 327. It authorizes the grant of rights of way for the use of the United States under Sections 323 *et seq.* upon application of other federal agencies. It does not authorize judicial condemnation. Interior may have used the term "condemnation" loosely to refer to procedures authorizing administrative conveyances of rights of way across Indian lands. Section 327 does broaden the Secretary's existing powers by permitting grants of rights of way over Indian lands to federal agencies in addition to, for example, "the proper state or local authorities" referred to in Section 311.

There is no mention of Section 357 in the legislative history or any indication that rights of way across allotted lands for highways or other purposes could be obtained by condemnation before or after the enactment of Sections 323 *et seq.*

implement different and conflicting objectives. In such circumstances, the Court should construe the statutes in a manner that effectuates current congressional policies. That means that acquisition of rights of way across allotted Indian lands should be governed exclusively by Sections 323 *et seq.*

In 1901, prevailing federal Indian policy was manifested in the General Allotment Act of 1887, 25 U.S.C. 331 *et seq.* The objects of the allotment policy "were to end tribal land ownership on the view that private ownership by individual Indians would better advance their assimilation as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian affairs." *Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649, 650 n.1 (1976). *See also Mattz* v. *Arnett,* 412 U.S. 481, 496 (1973); and Cohen, *Handbook of Federal Indian Law* 206-210 (1942). Allotted lands were to remain in trust for 25 years, 25 U.S.C. 348, after which "every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 25 U.S.C. 349. When seen in context as part of the entire allotment program, Section 357 simply made one group of state laws, those governing condemnation proceedings, applicable to allotted lands several years prior to the expiration of the trust period.[15]

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[15] By 1900, more than 60,000 allotments, approximately 5,500,000 acres, had been approved and the process was slowing down. Cohen, Handbook of Federal Indian Law 210-211 (1942). The majority of these allotments were approved prior to 1892. *Id.* Thus, in 1901, the foreseeable impact of Section 357 was to make state condemnation laws applicable to most Indian allotments 10 to 15 years earlier than scheduled under the General Allotment Act.

The allotment policy proved disastrous[16] "and was repudiated in 1934 by the Indian Reorganization Act [IRA], 48 Stat. 984, now amended and codified as 25 U.S.C. §§ 461 *et seq.*" *Mattz* v. *Arnett, supra,* 412 U.S. at 496 n.18, quoted in *Moe* v. *Confederated Salish and Kootenai Tribes,* 425 U.S. 463, 478-79 (1976). *See also Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 151 (1973) ("Unquestionably, the [Indian Reorganization] Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment.") Section 1 of the IRA, 25 U.S.C. 461, prohibited further allotments. Section 2, 25 U.S.C. 462, extended the existing periods of trust "until otherwise directed by Congress." Section 3, 25 U.S.C. 463 (a), authorized the Secretary to restore remaining, undisposed surplus lands to tribal ownership. Section 4, 25 U.S.C. 464, prohibited any "sale, devise, gift, exchange, or other transfer of restricted Indian lands. . . ." except as provided in the Act.[17] And Section 5, 25 U.S.C. 465, appropriated funds for the acquisition of additional tribal and allotted lands for Indians. While none of these provisions of the Indian Reorganization Act is directly applicable to the Tabbytite allotment, *see* note 17, *supra,* they do demonstrate the extent

[16] Between 1887 and 1934, the allotment process and the sale of so-called "surplus lands" had cut Indian land holdings from 138,000,000 to 48,000,000 acres. *See* Hearings on H.R. 7902, Committee on Indian Affairs, 73d Cong. 2d Sess. 15-18 (1934).

[17] In Minnesota v. United States, *supra,* 305 U.S. 382, the Solicitor General argued that this provision repealed Section 357. Brief for the United States, Minnesota v. United States, O.T. 1938, No. 73 at 33-36. That issue is not presented in this case because the Tabbytite allotment is not located within the boundaries of any Indian reservation and, under Section 8 of the Indian Reorganization Act, 25 U.S.C. 468, the Act had no effect on such allotments.

to which federal Indian policies changed between 1901 and 1934.

The 1948 Indian Right of Way Act embodies and furthers the policies of the IRA. This is most evident in Section 2 of the 1948 Act, 25 U.S.C. 324. It precludes secretarial grants of rights of way over tribal lands without the consent of tribes organized under the IRA and other related laws.[18] It also requires the allottees' consent for rights of way over allotted lands except in specifically described circumstances when obtaining the consent of all those with interests in the allotment would be impractical or unfair. These requirements are in keeping with the spirit of the IRA, to "turn . . . over to the Indians a greater control of their own destinies." *Morton* v. *Mancari, supra,* 417 U.S. at 553. They would be nullified if rights of way across allotted lands could be obtained by condemnation pursuant to Section 357.

When recent expressions of Congress' policies toward Indians undermine or are inconsistent with prior laws, this Court has given effect to the subsequent enactment. In *Bryan* v. *Itasca County,* 426 U.S. 373, 386-87 (1976), an act that was a product of the termination era of the 1950s was construed in a manner that

[18] This provision complements Section 16 of the Indian Reorganization Act, 25 U.S.C. 476, which empowers tribes organized under the IRA "to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." Section 16 apparently does not require tribal consent for rights of way across tribal lands granted by the Secretary because Section 3 of the IRA, 25 U.S.C. 463(b)(4), provides that nothing in the Act "shall restrict the granting or use of permits for easements or rights of way. . . ." Section 324 was obviously intended to fill this gap.

was more consistent with the Indian Civil Rights Act of 1968.

Moe v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 477-79 (1976), is even more directly on point. It held that a provision of the 1887 General Allotment Act, 25 U.S.C. 349, which subjects allottees to the civil and criminal laws of the states after issuance of fee patents, had been impliedly repealed as to reservation allotments. The Court noted that Congress had repudiated the allotment policy in 1934 and "by its more modern legislation has evinced a clear intent to eschew any such "checkerboard' approach within an existing Indian Reservation." 425 U.S. at 479. This case is identical in that the allotment policies on which Section 357 was predicated have been repudiated and, by its more recent legislation, i.e. the IRA and the 1948 Right of Way statute, Congress has evinced a clear intent to prevent the alienation or transfer of allotted lands without the consent of the Indian landowners.

In these circumstances, the rules enunciated and followed in ***Bryan*** and ***Moe*** inescapably lead to the conclusion that rights of way across allotted Indian lands are now governed by Section 323 *et seq.* and cannot be acquired by judicial condemnation. As stated in ***Bryan, supra,*** 426 U.S. at 388 n.14:

> [C]ourts 'are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.'

Moe carries this rule one step further by holding that current congressional policies should be implemented

even when they result in an otherwise disfavored partial repeal by implication.

It would be most anomalous indeed if the consent of Indian allottees were a prerequisite to grants of rights of way by the Secretary, the Indians' trustee, but rights of way could be obtained by condemnation without the approval of either the Secretary or the allottees.

C. The Relationship Between Sections 311, 323-328 and 357 Present Important and Recurring Issues That Should Be Decided in This Case.

The contention urged in Parts IA and IB, *supra,* that the delegation of power to the Secretary of the Interior to grant highway rights of way across allotted Indian lands precludes the acquisition of such rights of way pursuant to Section 357, are fairly encompassed within the question presented in the Petition for a Writ of Certiorari. For if the right of way cannot be acquired under Section 357 by judicial condemnation, it follows *a fortiori* that it cannot be taken by seizure. Admittedly, these arguments were not made to the lower courts. Nevertheless, the issues are important, likely to recur in this case as well as in future controversies, and overripe; they should be heard and resolved now.[19]

The Court of Appeals for the Ninth Circuit had previously held that rights of way through allotted lands can be acquired either by secretarial grants or by judicial condemnation. *Nicodemus* v. *Washington*

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[19] The decision in Plains Electric Generation & Transmission Cooperative, Inc. v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976), all but insures that the issue will be raised in litigation until it is finally determined by this Court.

Power Co., 264 F.2d 614, 618 (1959), following *United States* v. *Minnesota*, 113 F.2d 770 (8th Cir. 1940). It is unlikely that the court of appeals would have reversed itself if the arguments had been made. And this Court does have the benefit of the lower court's resolution of that same issue, albeit in a different case.

More importantly, if this Court reverses the judgment below solely on the grounds urged by the United States, Anchorage could be expected to file an action to condemn Tabbytite's property for its highway. Tabbytite would then defend on the ground that Section 357 is inapplicable, and that Anchorage must comply with the requirements of Sections 311 and 323 *et seq.* In that event, this controversy, which has already raged for more than 20 years and been in litigation for a decade, making its way twice through the court of appeals, would continue on indefinitely.

The questions are important, likely to recur, and were left open by this Court 40 years ago. They should now be resolved, once and for all.

II. TAKING PRIVATE PROPERTY BY SEIZURE IN THESE CIRCUMSTANCES WOULD BE BOTH UNCONSTITUTIONAL AND UNFAIR: SECTION 357 SHOULD BE CONSTRUED TO AVOID THESE RESULTS.

The lower courts held that the highway right of way through the Tabbytite allotment was legally taken as a result of the construction of the road by a private party and the subsequent transfer of the private party's interest in the road to the Municipality of Anchorage. Pet. App. at 1a, 3a, 8a-9a. It is undisputed that the United States and Tabbytite were not notified of any alleged taking when Anchorage took over control and maintenance of the road. On its face, this constitutes a blatant violation of the procedural

due process that is guaranteed by the Fifth and Fourteenth Amendments. *See, e.g. Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972).[20] Tabbytite therefore answers the question presented in this case in the negative because, *inter alia*, in the circumstances presented here a taking of property by seizure would be unconstitutional.

This Court has twice held that private property owners are entitled to be notified when municipalities invoke their powers of eminent domain. *Schroeder* v. *City of New York*, 371 U.S. 208 (1962); *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956). *See also, St. Louis & K. C. Land Co.* v. *Kansas City*, 241 U.S. 419, 427-28 (1916). In *Schroeder, supra*, the municipality argued that the property had been taken by physical occupation, that its use of the property was visible and well-known, that such use was sufficient to constitute the requisite notice, and that the property owner's claim for just compensation was barred by the applicable statute of limitations. *See* 371 U.S. at 213-14; and Brief for Appellee City of New York, *Schroeder* v. *City of New York*, O.T. 1962, No. 75, summarized at 9 L.Ed. 2d 1085. This Court rejected those contentions, holding that physical seizure is not sufficient notice under the Constitution and that personal notice is required.

> [K]nowledge of a change in the appearance of the river is far short of notice that the city had diverted it and that the appellant had a right to be heard on a claim for damages resulting from

[20] Both the Fifth and Fourteenth Amendments are applicable in this case since, under the lower court's theory, the physical seizure and taking of Tabbytite's property by Anchorage was authorized by Congress.

> the diversion. That was the information which the city was constitutionally obliged to make at least a good faith effort to give personally to the appellant—an obligation which the mailing of a single letter would have discharged.

371 U.S. at 214. *Schroeder* therefore stands for the proposition that a property owner cannot be deprived of his right to just compensation by the running of a statute of limitations unless the condemnor provides notice that satisfies due process requirements.

There is no basis for distinguishing governmental takings of private property by physical seizure from other state actions that affect property interests protected by the Due Process clauses of the Fifth and Fourteenth Amendments. Governments are not permitted to replevin personal property, or to terminate welfare benefits, or to suspend driver's licenses, or to garnish wages without providing personal notice and an opportunity to be heard. See *North Georgia Finishing, Inc.* v. *Di-Chem,* 419 U.S. 601 (1975); *Fuentes* v. *Shevin,* 407 U.S. 67 (1972); *Bell* v. *Burson,* 402 U.S. 535 (1971); and *Goldberg* v. *Kelly,* 397 U.S. 254 (1970). Since these property interests, which are not protected by the Just Compensation clause of the Fifth Amendment, *see e.g., Fuentes* v. *Shevin, supra,* 407 U.S. at 86; *Bell* v. *Burson, supra,* 402 at 535-39, are nevertheless entitled to procedural due process protection, there is no conceivable justification for relegating holders of compensable property rights to an inferior position.

The right to notice and an opportunity to be heard is especially vital where, as here, the applicable condemnation statutes permit property owners to challenge the authority, necessity, and extent of the taking.

See Alas. Stat. 09.55.270, 09.55.280, 09.55.300, 09.55.380, and 09.55.460, reproduced in Appendix B; *Bridges* v. *Alaska Housing Authority,* 349 P.2d 149, 153 (1960); and *Van Dyke* v. *Midnight Sun Mining & Ditch Co.,* 177 F. 85, 87 (9th Cir. 1910). The protection against government overreaching and mistake that is afforded private property owners by these and similar laws and by the initiation of condemnation proceedings is effectively nullified when property is taken by seizure. *Carey* v. *Piphus,* 435 U.S. 247, 259-60 (1978), and cases therein cited, quoted, and discussed; *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952); and *United States* v. *Winnebago Tribe of Indians,* 542 F.2d 1002 (8th Cir. 1976).

The remedy of "inverse condemnation," by which property owners seek just compensation when governments allegedly invade compensable property rights, is unobjectionable. Indeed it is an implicit part of the Fifth Amendment itself. *Davis* v. *Passman,* —— U.S. ——, 99 S.Ct. 2264, 60 L.Ed. 2d 846 (1979); *Jacobs* v. *United States,* 290 U.S. 13 (1933). Constitutional problems begin when that remedy is transformed into a device by which governments seize and purport to take property without offering just compensation and without providing notice or an opportunity to be heard.

There are occasions when governmental seizures are unavoidable because they are based on a good faith belief that compensable property rights have not been taken. *See e.g., United States* v. *Gerlach Livestock Co.,* 339 U.S. 725, 742-55 (1950); *United States* v. *Causby,* 328 U.S. 256 (1946); *Tempel* v. *United States,* 248 U.S. 1211 (1918). At times, it may be extremely burdensome and expensive to locate everyone who claims

an interest in the property that is to be taken for public purposes. *See, e.g. Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 317-18 (1950). The Constitution does not mandate the impossible, or even the extraordinary; nothing more than "good faith" or "reasonable" efforts are required. *Schroeder* v. *City of New York, supra,* 371 U.S. at 214; *Walker* v. *City of Hutchinson, supra,* 352 U.S. at 115-16; *Mullane* v. *Central Hanover Bank & Trust Co., supra,* 339 U.S. at 313-14 and 319.

No such difficulties or complications are present in this case. Tabbytite's interest in her allotment is clearly compensable; Section 357 itself requires payment of the money awarded as damages in the condemnation proceeding to be paid to the allottee. There is nothing esoteric about the property right involved in this case; the use of private land for a public road is a classic Fifth Amendment taking.[21] Everyone connected with this road has had personal knowledge of Tabbytite's interest since 1958 and the matter has been in litigation since 1969. Pet. App. at 12a-13a.

There is no conceivable excuse for the failure or refusal to provide notice and an opportunity to be heard under these circumstances. To be sure, governments may at times have a pressing need to take immediate possession of private property. It is also true that due process procedures are not inflexible and must take into account both the governmental function involved and the private interests protected by official

[21] While Anchorage's predecessors had claimed that they enjoyed an easement of necessity across Tabbytite's allotment, that issue had been resolved in favor of Tabbytite and the United States prior to Anchorage's first appearance in this case. *See* Brief in Opposition to Certiorari at 3-4.

action. *Fusari* v. *Steinberg,* 419 U.S. 379, 389 (1975); *Wolff* v. *McDonnell,* 418 U.S. 539, 560 (1974). But here the private interests are compensable property rights, one of the most basic foundations of our way of life. And while some public uses of private property are undoubtedly critically important as well as urgent, fortunately there are well-known and often utilized judicial procedures by which governments can lawfully acquire immediate possession of real property while fully recognizing and respecting the right to notice and an opportunity to be heard.

These procedures provide, in general, for the filing of a declaration of taking, the deposit into court of the estimated compensation, and the transfer of possession to the condemning entity upon terms and conditions that are fixed by the court. *See* 40 U.S.C. 258a-258e; Alas. Stat. 90.55.380-09.55.460, reproduced in Appendix B. They are designed to reconcile the rights of property owners to due process and just compensation with governments' need to avoid delay in acquiring necessary property. They would be rendered superfluous if property can be seized and occupied by governments at any time without so much as the filing of a complaint or the mailing of a letter.[22] And they

[22] The Alaska procedures are especially meticulous. They provide in some instances not only for notice prior to transfer of possession, but also for hearing. Alas. Stat. 09.55.390. In those situations, the court is required to make a finding "that urgent public necessity requires" the transfer of possession. *Id.* Municipalities are specifically authorized to utilize the declaration of taking procedure when exercising their powers of eminent domain for streets or highhighways. Alas. Stat. 09.55.420. The declarations must contain, *inter alia,* a description of the property and a statement of the estate or interest to be taken, statements of the public use for which it is taken and of the authority under which it is taken, and a map or plat showing its location. Alas. Stat. 09.55.430. Title vests and

demonstrate that absent unusual or exceptional circumstances, governments can, and are expected to, provide notice and seek and obtain court permission before acquiring possession of private property.

In the factual setting presented here, the taking of Tabbytite's property by physical seizure would be unconstitutional. To avoid the constitutional issue, the Court should hold that Section 357 does not authorize Anchorage to take Tabbytite's land without initiating

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compensation is determined as of the date of the filing of the declaration. Alas. Stat. 09.55.440, but "the right of entry shall not be granted the plaintiff until after the running of the time for the defendant to file an objection to the declaration of taking." Alas. Stat. 09.55.450. After the filing of the declaration and the deposit of the estimated compensation and the running of the time to file an objection, "the court may, upon motion, fix the time during which and the terms upon which the parties in possession are required to surender possession . . ." *Id.* And the court may even divest the plaintiff of title acquired under the declaration of taking procedure where it "finds that the property was not taken for a public use." Alas. Stat. 09.55.460. The Alaska Supreme Court appears to take these requirements and limitations seriously. Bridges v. Alaska Housing Authority, 349 P.2d 149 (1960). *See also* Russian Orthodox Greek Catholic Church of North America v. Alaska State Housing Authority, 498 P.2d 737 (Alas. 1972); and 1967 Op. Atty. Gen. (Alas.) No. 2, discussed and quoted in the Brief for the United States at 15-16. *But see* ARCO Pipeline Co. v. 3.60 Acres, More or Less, 539 P.2d 64 (Alas. 1975).

The formalities of the declaration of taking procedure are also a significant safeguard against careless or unauthorized invasions of compensable property rights by officials who have not been delegated, or are not properly exercising, the power of eminent domain. The likelihood of such occurrences is reduced by the detailed information that must be contained in the declaration, the opportunity for supervision and control by superior officials and government attorneys, and the necessity of depositing government funds with the court.

a condemnation action. *Wilson* v. *Omaha Indian Tribe,* —— U.S. ——, ——, 99 S.Ct. 2529, 2544, 61 L.Ed. 2d 153, 174-175 (1979) (Blackmun, J., concurring); *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490, 499-500 (1979); *Lorillard* v. *Pons,* 434 U.S. 575, 577 (1978); *Regional Rail Reorganization Cases,* 419 U.S. 102, 134 (1974).[23]

In addition to the constitutional dimension, the process by which governments "seize [private property] and say 'sue me', is high-handed government conduct and not to be favored." *United States* v. *Herrero,* 416 F.2d 945, 947 (9th Cir. 1969), *cert. denied,* 397 U.S. 973.[24] Disregarding its own advice, the decision of the court of appeals in this case provides substantial incentives for governments to take private property by physical seizure. *See* Brief for the United States at 17 and 19-23. By contrast, decisions of this Court in cases such as *United States* v. *Dickinson,* 331 U.S. 745 (1947), and *Jacobs* v. *United States,* 290 U.S. 13 (1933), have the opposite effect and, as noted by the United States in its Brief at 14-15, recent congressional policy encourages federal agencies to acquire property through condemnation proceedings rather than by seizure.

In *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 70 n.30 (1978), the Court relied on the "overriding duty of our Federal Government to deal fairly with Indians" in finding that Congress did not intend to create

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[23] Holding that the acquisition of the highway right of way is governed by Sections 311 and 323-328 as urged in Part I of this Brief also avoids the constitutional issues raised by takings by seizure.

[24] In its first opinion in this case, the court of appeals used the identical word, "high-handed," to characterize the original occupation of Tabbytite's land by respondent Clarke. Pet. App. at 15a.

a cause of action against tribal officials when the Indians had not had an opportunity to present their views. *See also Morton* v. *Ruiz,* 415 U.S. 199, 236 (1974). It is even more difficult to attribute to Congress an intent to authorize the seizure of Indian property without providing for notice or an opportunity to be heard.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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November 1979.

APPENDIX

APPENDIX A

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

June 19, 1978

CERTIFIED-RETURN RECEIPT REQUESTED
Echeverria & Osborne, Chartered
555 South Center Street
Reno, Nevada 89501

Mr. Larry W. Telford
One Market Plaza
San Francisco, California 94105

Gentlemen:

This is an appeal by the Southern Pacific Transportation Company, through its attorneys, from a decision of the Assistant Area Director of the Phoenix Area Office affirming the decision of the Superintendent, Western Nevada Agency, to reject for filing, Southern Pacific's application for a railroad right-of-way across tribal lands of the Walker River Reservation. A request was made on behalf of the appellant that the matter be referred to an Administrative Law Judge to conduct an evidentiary hearing. This request has been taken into consideration and rejected. The decision is therefore based on the written briefs of the appellee and the appellant.

A review of the file indicates the following relevant facts. The Southern Pacific Transportation Company (hereinafter "appellant") filed an application on April 28, 1977, for a railroad, telephone and telegraph right-of-way under the Act of March 2, 1899 (25 U.S.C. § 312, et seq). The application is for a 60-foot width, 10.89 miles in length, across

tribally-owned land. On May 4, 1977, the Agency Superintendent returned the application as being incomplete without written evidence of tribal approval. He recommended, at that time, ". . . that negotiations between you and the tribe be finalized before approval action can be considered on your application."

On May 27, 1977, the Acting Superintendent sent appellant a second letter outlining the contents of a properly filed application. In so doing, the Acting Superintendent specified that the application should be submitted under the Act of February 5, 1948 (25 U.S.C. 323), and that, among other things, the application " . . . must have the tribe's concurrence in the form of a tribal resolution." The Superintendent also indicated that the application for telephone and telegraph lines should be submitted separately.

On May 27, appellant filed an appeal with the area Director. On December 12, 1977, the Assistant Area Director, acting on the advice of the Portland Regional Solicitor, affirmed the agency's decision to return the application. The Area Director concentrated on the issue of whether appellant needed to show evidence of tribal consent in presenting its application. In so doing, the Area Director stated that the Secretary has the authority to require appellant to apply under the 1948 Act, but regardless of which act applied, tribal consent is a matter of statutory law and congressional policy. Therefore, waiver of the consent requirement would constitute an abuse of the Secretary's discretion. The current appeal is from the Area Director's decision.

In its argument, appellant has argued that it is entitled to file its application under the 1899 Act, and that requiring tribal consent is inconsistent with the terms of the 1899 Act. Appellant argues that the 1899 Act provides for an in *praesenti* grant and that requiring tribal consent cannot therefore be imposed afterwards as a condition of such a grant. Alternatively, the appellant argues that applying

the 25 CFR 161.3 consent requirement to applications filed pursuant to the 1899 Act is a denial of due process because the regulations do not make it clear that 161.3 is a pertinent section, applicable to applications under the 1899 Act. Finally, appellant has argued that given the history of the United States' actions toward appellant and its predecessor in interest, the Assistant Secretary should in this case exercise his discretion to waive the consent requirement. Alternatively, because of such behavior, the Assistant Secretary is estopped from applying the consent requirement.

Consent Requirement

We conclude that it is immaterial whether the subject application is filed pursuant to the 1948 or the 1899 Acts, since Congress has made it clear that the consent of tribes organized under the 1934 Indian Reorganization Act is essential before the United States can alienate interests in their trust lands. The Walker River Tribe is an IRA tribe. This requirement flows from 25 U.S.C. §476, which guarantees IRA tribes the power to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. In other words, the consent requirement is not, in our view, an attribute of the Secretary's power or discretion but is a statutory element of a tribe's sovereign power which the Secretary does not have the discretion to waive.

Indeed, the 1948 Right-of-Way Act specifically bars the Secretary's ability to abrogate a tribe's prerogative in such matters. "No grant of a right-of-way over and across any lands belonging to a tribe organized under sections 461-473 and 474-479 of this title; . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. § 324. (See also 1948 U.S. Code Cong. Service, p. 1033.)

That Congress fully understood and intended such a policy is clear from a 1969 report of the House Committee on Government Operations (H. Rep. 91-78, 91st Cong. 1st

Sess.), concerning this Department's revised right-of-way regulations which would have allowed the Secretary to waive the consent requirement in the case of non-IRA tribes.

> "We believe the Department's obligation to protect the rights of the Indian tribes should be concluded in regulations which clearly and emphatically preclude any possible misuse of right-of-way grants to alienate Indian land without the consent of the Indians or to evade the maximum terms of years fixed in the acts of Congress authorizing land leasing.
>
> For all of these reasons, it would appear best to retain the present section 161.3 without any change, and to announce unambiguously that your Department intends to observe its own regulations."
>
> (Letter to the Secretary of the Interior from Chairman, Natural Resources and Power Subcommittee, February 16, 1968.)

Appellant argues that since 25 U.S.C. § 326 preserves the Secretary's authority under prior right-of-way statutes, the Secretary has continuing authority under the 1899 Act to grant rights-of-way without regard to the consent requirement of § 324. We reject such an interpretation of § 326. The legislative history states that the purpose of the § 326 provision was to ". . . avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new . . . ." That counters the inference that § 326 was intended to maintain separate procedures immune from the consent requirement of the 1948 Act.

Also, § 326 must be read together with other sections of the same Act. While § 325 evidences Congress' awareness of continuing authority under other statutes to grant rights-of- way, § 324 categorically and unequivocally states

that "no right-of-way" shall be granted without tribal consent. Thus, the language of § 324 embraces rights-of-way granted under § 326. Furthermore, the precise language of § 326 creates an important distinction. It states that the Federal Water Power Act is neither repealed nor amended by the 1948 Act; but, it merely states that prior right-of-way statutes are not *repealed.* In other words, if imposition of the § 324 consent requirement can be construed as a quasi-amendment of the 1899 right-of-way Act, such an amendment is not barred by § 326. We do not think that either the language of § 326, or its legislative history, warrant an abridgement of the application of § 324 to all rights-of- way granted after 1948.

Due Process

We also conclude that, contrary to appellant's assertions, 25 CFR 161.3 and 25 CFR 161.23 make it clear that tribal consent must be obtained before any right-of-way can be granted. Therefore, appellant is not denied procedural due process. 25 CFR 161.23, the section applying to applications filed under the 1899 Act, provides that such applications shall also be subject to " . . . other pertinent sections of this Part 161." Because the consent requirement in 161.3 is so all-inclusive, "(a) No right-of-way shall be granted over and across any tribal land . . .," we do not see any room for question but that such a requirement is pertinent. Also, 161.15, the provision concerning action on applications, states that the grant of a right-of-way shall be evidenced in a conveyancing instrument which incorporates the conditions or restrictions set out in the required consent. Moreover, 161.14 requires that the consideration and damage deposit filed with the applications shall in no event be less than the amount specified in the consent. In other words, the consent requirement is pervasive in the Part 161 application scheme.

Estoppel

Finally, appellant argues that the Assistant Secretary ought to exercise his discretion to waive the consent requirement because of the Department's past approval of the right-of-way. They also argue that the Secretary is estopped from applying it because of such past behavior. As already stated, the Secretary does not have discretion to waive the requirement. Under the 1934 and the 1948 Acts, such an action would, in our view, infringe upon tribal sovereignty.

Moreover, estoppel is not applicable to the situation at hand. The case of *United States* v. *Wharton*, 514 F.2d 406 (C.A. 9 1975), cited by appellants, concerned title to public lands. The lands involved here are not public but are held in trust for the tribe. Morever, the *Wharton* decision placed emphasis on the facts that not applying estoppel would work a fundamental unfairness to the injured party but applying it against the United States would not unduly harm the public interest. Such is not the case here. Requiring the appellant to acquire tribal consent to its right-of-way application will not cause fundamental unfairness, as the divesting of title to land would have in the *Wharton* case. Moreover, the public interest, namely the tribe's sovereignty and ability to control its lands, would be unduly harmed were the consent requirement dropped in favor of the appellant. The compensation figure is to be negotiated and stated in the tribal consent. The tribe is the direct beneficiary of such compensation. Appellant essentially asks us to shift the burden of past government actions to the tribe's profound disadvantage—the loss of control over their lands and the inability to participate in the determination of how much they should be compensated for such use.

In addition, several cases cited in the *Wharton* decision indicate that courts are less likely to apply estoppel against the government in matters of legislative significance, as opposed to purely administrative matters (e.g., the interpretations of Department regulations). *Shuster* v. *C.I.R.*, 312 F.2d 311 (C.A. 9 1962). Appellant asks that estoppel be applied to prevent the federal statutory consent requirement from being applied to them. We do not see that past unauthorized Department approval of a right-of-way is adequate grounds for estopping the application of a current federal requirement. *Indeed,* if estoppel did not bar the United States from obtaining a federal appellate decision that appellant did not have a valid right-of-way and is a trespasser until such time as it acquires one, we see no basis for applying estoppel to prevent the Department from requiring an applicant to adhere to federal statutory standards in filing an application.

The Area Director's decision also discussed the requirement under the 1899 Act that any deposit tendered upon application to the Secretary must be for the amount determined by the Secretary to be correct. Also, the 1899 Act requires that the application stipulate that passenger terminals be provided. We think that these points can be worked out in conjunction with the agency when appellant submits its amended right-of-way application.

It is our conclusion that the Assistant Secretary cannot grant a right-of-way across the lands of a tribe which is subject to the provisions of the Indian Reorganization Act, without written evidence in the application of tribal consent—whether such application be submitted under the 1948 or the 1899 Act.

Accordingly, the decision of the Assistant Area Director dated December 12, 1977, is hereby affirmed. This decision, having been made in the capacity of Assistant Secretary

is final for the Department and not subject to the provisions of 25 CFR 2.19(c).

Sincerely,

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APPENDIX B

Pertinent Condemnation Provisions of Alaska Statutes and United States Code

1. Alaska Statute 09.55.270 provides:

Prerequisites. Before property can be taken, it shall appear that

(1) the use to which it is to be applied is a use authorized by law;

(2) the taking is necessary to the use;

(3) if already appropriated to a public use, the public use to which it is to be applied is a more necessary public use.

2. Alaska Statute 09.55.280 provides:

Entry upon land. In all cases where land is required for public use, the state, the public entity, or persons having the authority to condemn, or its agents in charge of the use may enter upon the land and make examination, surveys, and maps and locate the boundaries; but it shall be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of § 300 of this chapter. The entry shall constitute no cause of action in favor of the owners of the land except for injuries resulting from negligence, wantonness, or malice.

3. Alaska Statute 09.55.300 provides:

Powers of court. (a) The court has power

(1) to regulate and determine the place and manner of making the connections and crossings or of enjoying the common uses mentioned in § 260(5) of this chapter, and of the occupying of canyons, passes, and defiles for railroad purposes, as permitted and regulated by law;

(2) to limit the amount of property sought to be condemned if, in its opinion, the quantity sought to be condemned is not necessary.

(b) If the court determines that the property is to be taken for a public use, and if all parties to the action do not object, the court shall appoint a master to determine the amount to be paid by the plaintiffs to each owner or other person interested in the property as compensation and damages by reason of the appropriation of the property. If all parties to the action object to the appointment of a master the court shall proceed with a jury trial, unless the jury is waived by all parties to the action.

4. Alaska Statute 09.55.330 provides:

Compensation and damages. For the purpose of assessing compensation and damages, the right to them accrues at the date of issuance of the summons, and its actual value at that date is the measure of compensation of the property to be actually taken, and the basis of damages to property not actually taken but injuriously affected in the cases where the damages are allowed. If an order is made letting the plaintiff into possession, as provided in § 380 of this chapter, the compensation and damages awarded shall draw lawful interest from the date of the order. No improvements put upon the property after the date of the service of summons shall be included in the assessment of compensation or damages.

5. Alaska Statute 09.55.380 provides in pertinent part:

Order authorizing plaintiff to continue in or take possession. Upon application of the plaintiff at any time after the jury's verdict has been returned or the master's report has been filed in the court, the court may make an order that, upon payment into court of the amount of damages assessed in the report or by the jury, the plaintiff, if already in possession of the property sought to be con-

demned, may continue in possession and, if not in possession, the court may authorize the plaintiff to take possession of the property and use and possess it until the final conclusion of the proceedings, and that all actions and proceedings against the plaintiff on that account be stayed until that time. However, where an appeal is taken by the defendant, the court may also require the plaintiff to give a bond or undertaking with sufficient sureties before continuing or taking possession. The bond or undertaking shall be approved by the court and shall be in the sum the court may direct, and conditioned to pay defendant any additional damages and costs given by the judgment over and above the amount assessed, and the damages which defendant sustains if the property is not taken for public uses . . . .

6. Alaska Statute 09.55.390 provides:

Acquisition of easements and additional powers of the court to require surrender of possession to plaintiff. The right to take possession under this section is in addition to any other right to take possession provided in §§ 240-460 of this chapter. In proceedings for the acquisition of easements for the transmission and distribution of electric energy, communications, water, steam, and gas, the court may, upon motion and after a hearing, fix the time during which and the terms upon which the parties in possession are required to surrender possession to the plaintiff. If the court finds that urgent public necessity requires, it may grant the plaintiff possession at any time after the action has been commenced. Notice of the hearing shall be as provided in in the Rules of Civil Procedure, except that, where service by publication is required, notice may be given at any time following the date of the last publication by registered mail addressed to the defendant and to parties in possession at their last-known addresses as shown on the latest tax roll of the political subdivision in which the premises are located or as indicated by other evidence which shall be satisfactory to the court.

7. Alaska Statute 09.55.400 provides:

Deposit into court of estimated compensation and damages. The order given under § 390 of this chapter requiring the parties in possession to surrender possession to the plaintiff shall require that the plaintiff deposit with the clerk of the court an amount of money determined by the court fairly to represent the estimated compensation and the estimated damages to the defendant and for the speedy occupation, including reasonable relocation costs if required. In addition the court shall include in its order a further requirement that the plaintiff execute and file with the clerk of the court a bond, approved as to form and as to sufficiency of the sureties by the court, in an amount equal to the amount of money required to be deposited, conditioned upon payment to the defendant of additional damages and costs found to be due to the defendant in the action. No costs or attorney fees shall be assessed against the defendant in an action brought under § 390 of this chapter.

8. Alaska Statute 09.55.420 provides:

Declaration of taking by state or municipality. (a) Where a proceeding is instituted under §§ 240-460 of this chapter by the state, it may file a declaration of taking with the complaint or at any time after the filing of the complaint, but before judgment. Where a proceeding is instituted under §§ 240-460 of this chapter by a municipality in the exercise of eminent domain for street or highway, off-street automobile parking facilities, school, sewer, water, telephone, electric, other utility, and slum clearance purposes or use granted to cities of the first class, the governing body of the municipality may exercise the power through the filing of a declaration of taking with the complaint or at any time after the filing of the complaint, but before judgment. The declaration of taking procedure may not be used with relation to the property of rural electrification or telephone cooperatives or nonprofit associations receiving financial assistance from the federal government under the Rural Electrification Act; provided that no declaration of taking for off-street parking purposes may be used unless there has been public notice by publication in a newspaper of general circulation in the area for not less than once a week for four consecutive weeks followed by a full and complete public hearing held before the governing body of the first class city or municipality.

(b) Notwithstanding the provisions of (a) of this section, until July 1, 1975, a home rule city of over 50,000 population may exercise the power of declaration of taking under § 240(c) of this chapter. When the home rule city exercises this power for the United States government, the just compensation paid for the property shall include all relocation and other costs to the extent required by the Uniform Relocation Assistance and Real Property Acquisition Act of 1970.

9. Alaska Statute 09.55.430 provides:

Contents of declaration of taking. The declaration of taking shall contain

(1) a statement of the authority under which the property or an interest in it is taken;

(2) a statement of the public use for which the property or an interest in it is taken;

(3) a description of the property sufficient for the identification of it;

(4) a statement of the estate or interest in the property;

(5) a map or plat showing the location of the property;

(6) a statement of the amount of money estimated by the plaintiff to be just compensation for the property or the interest in it.

10. Alaska Statute 09.55.440 provides:

Vesting of title and compensation. (a) Upon the filing of the declaration of taking and the deposit with the court of the amount of the estimated compensation stated in the declaration, title to the estate as specified in the declaration vests in the plaintiff, and that property is condemned and taken for the use of the plaintiff, and the right to just compensation for it vests in the persons entitled to it. The compensation shall be ascertained and awarded in the proceeding and established by judgment. The judgment shall include interest at the rate of six per cent per year on the amount finally awarded which exceeds the amount paid into court under the declaration of taking. The interest runs from the date title vests to the date of payment of the judgment.

(b) Upon motion of a party in interest and notice to all parties, the court may order that the money deposited or a part of it be paid immediately to the person or persons entitled to it for or on account of the just compensation to be awarded in the proceedings. If the compensation finally awarded exceeds the amount of money deposited, the deposit shall be offset against the award. If the compensation finally awarded is less than the amount of money deposited, the court shall enter judgment in favor of the plaintiff and against the proper parties for the amount of the excess.

11. Alaska Statute 09.55.450 provides:

Right of entry and possession. (a) Upon the filing of the declaration of taking and the deposit of the estimated compensation, the court may, upon motion, fix the time during which and the terms upon which the parties in possession are required to surrender possession to the petitioner. However, the right to entry shall not be granted the plaintiff until after the running of the time for the defendant to file an objection to the declaration of taking. Where the party in possession withdraws any part of the award and

remains in possession, the court may fix a reasonable rental for the premises to be paid by that party to the plaintiff during such possession.

(b) The court may direct the payment of delinquent taxes and special assessments out of the amount determined to be just compensation, and make orders with respect to encumbrances, liens, rents, insurance, and other charges as are just and equitable.

(c) The right to take possession and title in advance of final judgment where a declaration of taking is filed is in addition to any other rights to take possession provided in §§ 240-460 of this chapter.

12. Alaska Statute 09.55.460 provides:

Effect of appeal. (a) No appeal or a bond or undertaking given operates to prevent or delay the vesting of title to real property or the right to possession of it.

(b) The plaintiff may not be divested of a title acquired except where the court finds that the property was not taken for a public use. In the event of that finding, the court shall enter the judgment necessary to (1) compensate the persons entitled to it for the period during which the property was in the possession of the plaintiff, and (2) recover for the plaintiff any award paid to any person.

13. The Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258a-258e, provides:

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands de-

scribed in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing of said declaration of taking and the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation, shall be ascertained and awarded in said proceeding and established by judgment therein, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the

just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance and other charges, if any, as shall be just and equitable.

SEC. 2. No appeal in any such cause nor any bond or undertaking given therein shall operate to prevent or delay the vesting of title to such lands in the United States.

SEC. 3. Action under this statute irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid.

SEC. 4. The right to take possession and title in advance of final judgment in condemnation proceedings as provided by this Act shall be in addition to any right, power, or authority conferred by the laws of the United States or those of any State or Territory under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority.

SEC. 5. In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irre-

vocably committed to pay the amount untimately to be awarded as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land in erecting public buildings or public works thereon, notwithstanding the provisions of section 355 of the Revised Statutes of the United States: *Provided,* That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.

FOR ARGUMENT

Supreme Court, U.S.
FILED
DEC 31 1979
MICHAEL RODAK, JR., CLERK

No. 78-1693

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

GLEN M. CLARKE, MUNICIPALITY OF ANCHORAGE, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE MUNICIPALITY OF ANCHORAGE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1693

UNITED STATES OF AMERICA

v.

GLEN M. CLARKE, MUNICIPALITY OF ANCHORAGE, et al.

On Writ of Certiorior to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE MUNICIPALITY OF ANCHORAGE

OPINIONS BELOW

The Municipality of Anchorage concurs with the treatment of this issue by the United States.

JURISDICTION

The Municipality of Anchorage concurs with the treatment of this issue by the United States.

QUESTIONS PRESENTED

Did the Court of Appeals for the Ninth Circuit err in holding that if laws of the state allow land to be taken for public purpose through inverse condemnation or a taking in the nature of inverse condemnation, as well as by formal, judicial, condemnation proceedings which precede the taking, 25 U.S.C. § 357 allows lands allotted in severalty to Indians to be condemned for public purpose through inverse condemnation or a taking in the nature of inverse condemnation, as well as by formal, judicial, condemnation proceedings?

Stated conversely, does 25 U.S.C. § 357 deprive Indians, whose lands have been allotted in severalty, of a constitutional cause of action to which all other American citizens are entitled whose property has been taken for public purpose for a state or its political subdivision with the power of eminent domain under the laws of the state, albeit without a formal, judicial eminent domain proceeding, for recovery of just compensation for a taking in inverse condemnation or in the nature of inverse condemnation?

STATUTES INVOLVED

Section 3 of the Indian Appropriation Act of March 3, 1901, 31 Stat. 1084, 25 U.S.C. § 357, provides in pertinent part:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

All other relevant statutes are set forth in R: App. C-K; Brief for the United States, pages 2-4; Brief for Bertha May Tabbytite, pages 2-6 and its Appendix B.

STATEMENT

General

The United States attempts to categorize the controversy concerning the roadway across Mrs. Tabbytite's land as a feud between two homesteaders on a remote mountain top in frozen Alaska; the principal issue, seemingly, whether one homesteader, Clarke, could obtain the right to maintain a road to his homestead by continued trespass across the lands of his neighbor. This is misleading. The real issue before this court is whether a road which was heavily used as a public city street wholly within city boundaries between 1961 and 1975, indeed the main street of the city, and a publicly maintained municipal roadway since 1975 within the Municipality of Anchorage, a modern city encompassing half of the population of the State of Alaska, has been taken for public use through inverse condemnation or taking in the nature of inverse condemnation.

Facts

1. Glen Alps was incorporated as a third-class city by order of the Superior Court, Third Judicial District, Alaska, Case No. 61-60, on June 8, 1961. It encompassed all of Section 30, Township 12 North, Range 2 West (App. 35-37).

2. Immediately after incorporation, the City maintained and used the road crossing Section 30, including that portion crossing Tabbytite's property, as a public road; snow plowing it in the winter and grading it in the summer (TR: 69). The road crossing Tabbytite's property was fully within Section 30, the city boundaries (Plaintiff's Exhibit 8). (Plaintiff's Exhibits were filed on June 27 and 28, 1972.)

3. Between 1955 and 1966 Tabbytite was a homestead entrywoman without patent. On February 24, 1966 she relinquished her homestead rights (Plaintiff's Exhibit 5). On June 9, 1966 she was granted an Indian allotment (OR: 293; Plaintiff's Exhibit 7). Tabbytite's entry date, for purposes of the allotment was January 12, 1962 (Plaintiff's Exhibit 5).

4. The road across Mrs. Tabbytite's land was maintained and used as a public, city road between the time of the city's incorporation in 1961 until unification in September, 1975. It was the main street of the city (TR: 222-223, 230, 238).

In 1970, at the beginning of the current litigation, the City of Glen Alps attempted to acquire title to the road through emi-

nent domain. The first affirmative defense in the Answer for the City of Glen Alps, filed December 9, 1970 stated:

> Defendant City of Glen Alps alleges that it is a city of the third-class and possesses powers of condemnation under Alaska law. This defendant further alleges that any road across Mrs. Tabbytite's land is and has been a public road and that defendant has maintained such road. If the court should determine that said road cannot be properly maintained for the public, this defendant will request leave to amend this answer to file a counterclaim in condemnation.

After a trial on the merits, the District Court's order of November 19, 1973 (Pet. App. F) denied the Glen Alps counterclaim in condemnation as being "moot."

5. Prior to September 16, 1975, the City of Glen Alps was situated within the geographic boundaries of the Greater Anchorage Area Borough. Other cities existing within those boundaries were the City of Anchorage, a home rule city, and the City of Girdwood, a first-class city, organized under the laws of the State of Alaska. The Greater Anchorage Area Borough was a municipal corporation organized under the laws of the State of Alaska and constituted a form of regional government, roughly an analagous to a county.

On September 9, 1975 the voters approved a home rule charter which unified all existing governments into a single home rule entity and dissolved the former cities and the Greater Anchorage Area Borough. The election results were certified on September 16, 1975. Such action was taken pursuant to the Alaska Statutes. (R. App. I)

Pursuant to these provisions, as well as the Anchorage Municipal Charter which was enacted on September 16, 1975 (R. App. J), the unified government succeeded to all rights, titles, actions, suits, franchises, contracts and liabilities of the former cities and borough. The former cities, including the City of Glen Alps, became service areas within the Municipality for provision of services formerly provided within their boundaries (Motion Requesting Substitution of Municipality of Anchorage for City of Glen Alps as a Defendant, Memorandum

in Support of Motion to Substitute Municipality of Anchorage for Defendant City of Glen Alps, Affidavit of Richard A. Weinig, Entry of Appearance of Municipality of Anchorage, Affidavit of Phyllis Eileen Banks, Home Rule Charter for the Municipality of Anchorage, Anchorage Assembly minutes of September 16, 1975, filed with the Ninth Circuit Court of Appeals on March 15, 1976 in Case No. 74-1659).

6. Since unification on September 16, 1975, the road in question has been maintained and used as a public road of the Municipality of Anchorage (App. 38-39).

7. In September, 1975 when the Municipality began to use and maintain the street as a public road, it did so pursuant to a final judgment of the United States District Court for the District of Alaska that the road was a public throughfare, as an easement of necessity (Pet. App. F). During the five months between September, 1975 and February, 1976, when the Ninth Circuit Court of Appeals entered judgment reversing the judgment of the District Court, the Municipality had maintained the road through the rigors of an Alaskan winter pursuant to the District Court's judgment, which bound the Municipality since it was a legal successor in interest to all rights and obligations of the former City of Glen Alps (See Paragraph 5 above). The Ninth Circuit's opinion was issued on February 4, 1976 and its judgment was not entered until April 16, 1976 (R: 1-5). On March 15, 1976, before entry of judgment, the Municipality promptly moved to intervene as a home rule municipality with the powers of eminent domain and successor in interest to the former City of Glen Alps, which had maintained the road for the fourteen years prior to unification (See Paragraph 5, *supra*). Intervention of the Municipality in place of Glen Alps, was granted on April 5, 1976 (R: 12).

Shortly after the voluminous record on appeal was returned to Anchorage by the Ninth Circuit Court of Appeals, the Municipality moved for summary judgment, in the nature of declaratory judgment, to ascertain whether the road had been condemned through a taking in the nature of inverse condemnation, pursuant to the laws of Alaska and the provisions of 25 U.S.C. § 357 (R: 19-24; 26-30; 31-37; 48-63). It offered to

pay just compensation, be adjudicated by the United States District Court in this action, if the parties could not agree upon an appropriate amount (R: 30, 60). The parties stipulated to stay application for injunctive relief until the issue of whether a taking in the nature of inverse condemnation had been resolved by the District Court, with leave given to the Municipality to file a formal judicial eminent domain proceeding within thirty days after judgment if the Court determined that no taking in the nature of inverse condemnation had occurred (R: 39-40).

On November 9, 1976 the District Court ruled that no taking in the nature of inverse condemnation occurred prior to September, 1975 because the City of Glen Alps, as a third-class city, lacked the power of eminent domain. However, it invited the parties to re-brief the issue concerning whether a taking in the nature of inverse condemnation might have occurred after unification because the home rule, Municipality of Anchorage possessed the power of eminent domain (R: 111-114). The parties stipulated to stay injunctive proceedings pending resolution of this issue (R: 149-150).

On April 7, 1977 the District Court ruled that a taking in the nature of inverse condemnation had occurred as of the date of unification in September, 1975; that injunctive relief and trespass damages after this date were inappropriate (R. App. B).

The United States appealed to the Ninth Circuit Court of Appeals on June 6, 1977 (R: 174). In January, 1979, that Court affirmed the District Court's opinion. 590 F.2d 765 (9th Cir. 1979) (R. App. A).

8. The United States conceded in its Brief to the Ninth Circuit Court of Appeals (App: 41):

> There is no dispute but that federal law, Section 3 of the Indian Appropriation Act of 1901, 31 Stat. 1058, 1084, 25 U.S.C.A. § 357, authorizes the State of Alaska (or here its authorized political subdivision, the Municipality of Anchorage) to condemn that portion of the Tabbytite allotment necessary for the road.

9. The necessity for placement of the road in its present location, in a manner commensurate with the greatest public good and least private harm, had been litigated previously in this case, in Action No. 69-69, in a three-day trial upon the merits on June 27, 28 and 29, 1972.

In that trial there was uncontradicted testimony among witnesses qualified as experts in the construction and location of roadways, that the road was situated in the best practical location from both the standpoint of public and private interest due to the topography of the land.

Jack M. Spake, District Engineer for the Alaska Department of Highways, testified that in the course of his professional duties he had traveled the road thirty-five or forty times (App. 2, 3). He further testified that, in his professional opinion as the District Engineer for the Alaska Department of Highways, the present location of the road was the only practical place in which such a road could be situated (App. 8). He testified:

> I would say in my observation and analysis of the contures as shown on this map, the road is about as well placed, I believe, as you could actually put a road of this type (App. 8).

Rodney Spendlove testified that he had been a contractor actively engaged in the construction of roadways throughout Alaska for the nineteen years prior to trial (App. 15). Although he had no involvement in construction of the road, (App. 14) he testified that the present location of the road was the best practicable location in which such a road could be situated considering the topography of the land (App. 15, 18, 19). Neither the United States nor Mrs. Tabbytite introduced any expert testimony to contradict that of either Mr. Spake or Mr. Spendlove.

William Wakeland was a real estate appraiser who had been employed by the United States on behalf of the Bureau of Indian Affairs. He acknowledged that he had no engineering expertise concerning the location and construction of roadways (App. 32-33). However, he testified that the road, in its present

location, had *increased* the value of the land, rather than depreciated it (App. 28).

> Q What did you find the highest and best use of the property to be?
>
> A Potential subdivision, small tracts, in keeping with the restrictions imposed by the municipality.
>
> THE COURT: Would you repeat your answer?
>
> THE WITNESS: I found the best use to be the potential for future subdivision into small tracts (App. 29).

He offered no expert testimony that the road was not situated in a manner commensurate with the greatest public good and least private harm (App. 32-33). To the contrary, he offered the following testimony (App. 32-33):

> Q Well, you must have some background or knowledge to act as an appraiser, since you have also indicated the highest and best use would be a subdivision for small tracts; is that correct?
>
> A We work with them constantly.
>
> Q Do you know of any other route that you could recommend to the Court and counsel that road could take to better improve the Tabbytite property for a subdivision than that one which is now constructed?
>
> A Yes. I might point out that I pointed that out in my report [115]. It tends to be wasteful of a little of her property. The general alignment, I think, serves a subdivision. There are some minor problems. You will notice at the southeast corner of the property the road cuts back into it. There is no benefit to the subject property there. It should have either gone below a reasonable site or missed all together. That is wasting part of the property right there. And there is a couple other minor adjustments that might be made in that road to better serve a potential subdivision, but in general the alignment appears about what a person might have put in there if they were subdividing.

> Q Mr. Wakeland, assuming that you would construct another road to serve the area, as to better utilize the entire property, would that proposed road cost more than what the original road cost to get in there?
>
> A I don't know. I am not an engineer. We don't have a route surveyed. I don't know whether a right-of-way is practical or not. I did not examine that aspect.

Based upon this testimony, the District Court ruled that the road was situated in the only practical location in which a road could be situated upon that part of Anchorage; indeed that there were no practical alternatives to the present location of the road (Pet. App. F). The judge stated, in ruling upon this factual matter:

> The United States and Intervenor strongly urges that other access routes are available to the public, but the Court finds no convincing evidence whatsoever that this is true. In fact, the opposite is found to be true—that the route taken by Clarke at the time of road construction in 1958 was the only practical one available at reasonable cost for year-round access. In short, the Court finds the road to be a way of necessity (Pet. App. F).

While the Ninth Circuit Court of Appeals overruled the judge's *legal* termination that the road was "a way of necessity" (Pet. App. 11a-15a), the *factual* determination that the location of the road was the only practical one commensurate with the greatest public good and least private harm was not placed in the issue before the Ninth Circuit. This issue was not raised in the United States Points on Appeal and was not ruled upon by the Ninth Circuit. *United States v. Clarke*, 529 F.2d 984 (9th Cir. 1976) (Pet. App. E, 11a-15a). Therefore, this factual finding was res judicata upon both the United States and Tabbytite before the Municipality began maintenance of the road as a public throughfare after unification in September, 1975.

Issues of Law

Since Alaska law allows condemnation by formal eminent domain proceedings *or* a taking in inverse condemnation *or* a taking in the nature of inverse condemnation, as will be discussed below, does the taking by the Municipality of Anchorage for public purposes through inverse condemnation or in the nature of inverse condemnation satisfy the statutory authorization to condemn lands allotted in severalty to Indians contained in 25 U.S.C.A. § 357, particularly since the United States has conceded that the Municipality has the authority to condemn "that portion of the Tabbytite allotment necessary for the road," (App. 41) and since *factual* issue of reasonable placement of the road in its present location has been adjudicated previously in this action (App. 2-3, 8; 14, 15, 18, 19; 28, 32-33; Pet. App. 18a).

If such taking has occurred, the Municipality stipulates that Mrs. Tabbytite is entitled to just compensation, as well as trespass damages incurred prior to the taking in September, 1975, and that such issues may be adjudicated in this action upon the remand without the necessity of filing a separate action. The Municipality further suggests that the principal reason why each issue has not been resolved to date is the pendency of this appeal by the United States. Under Alaska law, the date of evaluation, if there has been a taking in inverse condemnation or in the nature of inverse condemnation, is the date of the original entry upon the land in question. *City of Anchorage v. Nesbett,* 530 P.2d 1324, 1334-36 (Alaska 1975).

SUMMARY OF ARGUMENT

25 USC § 357 ALLOWS "CONDEMNATION" OF INDIAN ALLOTMENT LANDS BY TAKING IN THE NATURE OF INVERSE CONDEMNATION

1. Section 235 allows lands allotted in severalty to Indians to be "condemned" under the laws of the particular state or territory in the same manner as land owned in fee may be condemned. Therefore, what constitutes condemnation and the procedures for effecting it are a matter of state, rather than

federal law. In Alaska, it is well established that if land is taken for a public purpose by a government which possesses the power of eminent domain, albeit without prior institution of formal judicial condemnation proceedings, this constitutes a taking in the nature of inverse condemnation and, upon payment of just compensation, is a valid condemnation. *State Department of Highways v. Crosby,* 410 P.2d 724, 729 (Alaska 1966).

2. In September, 1975, Anchorage, a newly created home rule municipality, began maintaining the road across Tabbytite's land as a municipal roadway. As successor of the former City of Glen Alps, it began such activities while bound as prevailing party in a judgment by the United States District Court that the roadway was a public thoroughfare as a consequence of an easement of necessity. Anchorage maintained the road through an Alaskan winter until the District Court's opinion was reversed by the Ninth Circuit in February, 1976. Shortly thereafter, it entered an appearance in this action, in substitution for the former City of Glen Alps, and filed motions for summary judgment to determine whether the roadway was public, having been taken by inverse condemnation. Both the District Court and the Ninth Circuit Court of Appeals ruled that the taking in the nature of inverse condemnation had occurred.

3. Pursuant to this judgments, the Municipality has maintained the road until this time. It is willing to adjudicate just compensation in this action for a taking as of September, 1975, the date of taking.

4. If this court construes § 357 to deny Indian allottees a cause of action in the nature of inverse condemnation, Indians, as a class, would be harmed. They could well be forced to assume a disproportionate share of costs of public improvements or other governmental actions. Remedies of trespass and injunction may not always be adequate. Indian allottees would not be entitled to the remedies afforded in the overflight cases such as *United States v. Causby,* 328 U.S. 256 (1946), or the inundation cases such as *Hurly v. Kincaid,* 285 U.S. 95 (1932).

Moreover, such a construction would preclude Indians from a cause of action, the breath of which is demonstrated by *Albers v. California,* 398 P.2d 129 (Cal. 1975), in which the Supreme Court of California awarded $5,360,000 in inverse condemnation claims for damage to private property on the basis of strict liability. In *Albers*, there was no negligence, nuisance, foreseeability, or basis of recovery in tort. Since there was no physical invation to the property, an injunction would have afforded no relief. (*Albers* is discussed at 23-27 *infra.*).

UNITED STATES BRIEF

1. The United States argues that when § 357 was enacted in 1901, the word "condemned" referred exclusively to a judicial proceeding in eminent domain filed prior to entry upon the land and excluded "seizure" or what is now known as inverse condemnation. This ignores contemporaneous construction of contemporaneous acts. In 1902, the same Congress which enacted § 357 enacted § 7 of the Reclamation Act of 1902, 32 Stat. 389, 43 USC § 421. It allowed the Secretary of the Interior to acquire property "by condemnation under judicial process," a term more restrictive than the word "condemned" occurring in § 357. This Court in *United States v. Buffalo Pitts Co.,* 234 U.S. 228, 233 (1913), held that the language "condemnation under judicial process" allowed a taking by seizure. *See also, State v. Rank,* 493 F.2D 340, 345-355 (9th Cir. 1961) *aff'd Dugan v. Rank,* 372 U.S. 609, 619, 10 L.Ed.2d 15, 22-23 (1963). At least four other congressional acts, enacted between 1880 and 1916 which used the word "condemned," were construed by this Court. In each instance, the effect of the court's ruling was to allow condemnation, pursuant to the statute, by a taking without prior judicial proceedings and with the landowner relegated to a subsequent action for implied contract, in essence, inverse condemnation.

Four of the five state cases cited by the United States on page 12 of its brief to indicate that inverse condemnation did not exist in 1901 are, in their fact patterns, classic inverse condemnation cases.

2. If § 357 is construed to allow a taking in the nature of inverse condemnation, a state or municipality could never acquire title to the allotment without payment of just compensation. Title does not pass without payment of just compensation. *United States v. Lynah*, 188 U.S. 445 (1903). So if just compensation is not made, 28 USC § 2415(c) specifically allows the United States to recover possession of the property regardless of the time which may have lapsed after the original entry. Any action in the nature of inverse condemnation to recover just compensation must be in federal court with the United States as an indispensable party plaintiff as trustee. *Minnesota v. United States,* 305 U.S. 382 (1939).

TABBYTITE BRIEF

1. All Circuit Courts passing on the issue, as well as this court on at least one occasion, have held that 25 USC § 311 and § 325 are alternative remedies for acquisition of rights-of-way by state or its political subdivision. *United States v. Minnesota*, 113 F.2d 770, 773 (8th Cir. 1940); *Nicodemus v. Washington Power Company,* 264 F.2d 614 (9th Cir. 1959); *United States v. Oklahoma Gas and Electric Company,* 127 F.2d 349, 354-55 (1942), *aff'd* 318 U.S. 206, 214 (1943); *Transok Pipeline Company v. Darks,* 565 F.2d 1150, 1153 (10th Cir. 1977, *cert. den.* 435 U.S. 1006 (1978).

2. The act of February 5, 1948, 25 USC §§ 323-328 did not repeal § 357 by implication. The 1948 act dealt with Secretarial grants of right-of-way, a consentual transaction in nature. Section 357 deals only with condemnation, the power of eminent domain. The very definition of eminent domain includes a taking without consent of the owner. 1 *Nichols on Eminent Domain* § 1.11 (3rd Rev. Ed. 1976). The two acts deal with totally different subject matter. Moreover, the legislative history of the 1948 act indicates that insofar as it considered condemnation at all, the bill "broadens existing powers of condemnation over individually owned Indian lands." *U.S. Code and Congressional News*, 1036 (1948). Its further intention was not to expand the right of Indian allottees to refuse to consent to Secretarial grants of right-of-way; it was to broaden the

Secretary of the Interior's power to grant such right-of-ways regardless of the Indians' consent, a measure advocated by the Secretary in the interest of departmental efficiency. (*Id.*)

3. If 25 USC §§ 323-328 supercede any rights granted to states or their political subdivisions by § 357 to condemn allotment lands, either by rule of statutory construction of by implied repeal, and this Court construes these statutes to preclude any condemnation of allotment lands without prior compliance the procedures set forth in § 324, no condemnation of land held by a single allottee would be possible. Section 323 does not allow the Secretary to approve a right-of-way grant across an allotment held entirely by a single Indian without that allottee's consent. Construction of condemnation statute to require consent of the condemnee before the land can be taken through the power of eminent domain is, at best a contradiction in terms; at worst, an absurdity. Under such a construction, any state or municipal project for the public good which required crossing an individually owned allotment by use of the power of eminent domain could be stopped permanently by one recalcitrant Indian.

4. Tabbytite has been an active party and participant in this action since 1972 and has been represented by counsel. She has received full due process from the Municipality of Anchorage.

ARGUMENT

A TAKING OF INVERSE CONDEMNATION OR IN THE NATURE OF INVERSE CONDEMNATION OCCURRED ON SEPTEMBER 16, 1975 AND SATISFIES THE CONDEMNATION REQUIREMENTS OF 25 U.S.C. § 357

Since the Municipality of Anchorage has the power of eminent domain granted by state law, (App. 41), its use and maintenance of the road in question as a public roadway since September 16, 1975 has constituted an appropriation of Tabbytite's property beneath the road for public purpose, albeit without benefit of formal eminent domain proceedings. Under Alaska law, this constitutes a taking in the nature of inverse condemnation. *Myers v. United States,* 323 F.2d 580, 582-83 (9th Cir. 1963); *State Department of Highways v. Crosby,* 410 P.2d 724, 728-29 (Alaska 1966); *City of Anchorage v. Nesbett,* 530 P.2d 1324 (Alaska 1975); *Wickwire v. City and Borough of Juneau,* 557 P.2d 783 (Alaska 1976); *See United States v. Causby,* 90 L.Ed. 1206 (1946); *Hurley v. Kincaid,* 285 U.S. 95, 104-105, 637, 643 (1932); *United States v. Cress,* 243 U.S. 316, 61 L.Ed. 746, 753-54 (1917). The issue of just compensation must still be adjudicated in this action upon remand. The Municipality offers its fullest cooperation toward resolution of this issue.

Lands allotted to Indians in severalty may be condemned by a municipality vested with powers of eminent domain by state law. 25 U.S.C.A. § 357. Section 357 states in full:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned and the money awarded as damages shall be paid to the allottee.

This is a power available to a body empowered to exercise eminent domain under state law, which is an alternative to securing a permit from the Secretary of the Interior pursuant to 25 U.S.C.A. § 311. *United States v. Minnesota,* 113 F.2d 770, 773 (9th Cir. 1940); *Nicodemus v. Washington Power Company,*

264 F.2d 614 (9th Cir. 1959); *Transok Pipeline Company v. Darks,* 565 F.2d 1150, 1153 (10th Cir. 1977) *cert. denied,* 435 U.S. 1006 (1978). State law governs whether the condemning agency is empowered to exercise this power and the manner of the proceeding so long as the issue of just compensation is adjudicated in federal, rather than state, court. *United States v. Minnesota, supra; Nicodemus v. Washington Power Company, supra; United States v. Oklahoma Gas & Electric Co.,* 127 F.2d 349, 354-55, *aff'd,* 87 L.Ed. 716 (10th Cir. 1942); *City of Okemah, Okl., v. United States,* 140 F.2d 963, 966 (10th Cir. 1944).

Alaska state law allows exercise of the power of eminent domain through inverse condemnation or a taking in the nature of inverse condemnation. *State Department of Highways v. Crosby,* 410 P.2d 724, 728-39 (Alaska 1966); *See City of Anchorage v. Nesbett,* 530 P.2d 1324, 1334-35 (Alaska 1975); *Myers v. United States,* 323 F.2d 580, 582-83 (9th Cir. 1963); *Wickwire v. City and Borough of Juneau,* 557 P.2d 783 (Alaska 1976).

In *Crosby, supra,* as in *Myers, supra,* the fact situation was strikingly similar to that in the present case. In each case, a public body with powers of eminent domain constructed or maintained a road across private land in a mistaken belief that it was entitled to do so. In *Myers* and *Crosby,* the mistake concerned section line rights-of-way. In the present case, the mistake concerned a belief that an easement of necessity existed across Mrs. Tabbytite's land, a belief with which the District court concurred until reversal by the Ninth Circuit Court of Appeals in April, 1976. In *Myers v. United States,* 323 F.2d 580, 582-83 (9th Cir. 1963) the United States, through the Bureau of Public Roads, constructed a road in Alaska on the belief that it was situated upon a section line right-of-way. The property owners sued for injunction and trespass. The court held:

> It is clear to us that the claims of the appellants asserted against the United States are to recover damages for the taking for public use of property claimed to be owned by the appellants, without the institution of condemnation

> proceedings. The repeated characterization by the appellants of the taking by the United States as one of trespass and the commission of waste upon the lands in question does not convert the claims to cases sounding in tort and thereby confer jurisdiction on the District Court under the Federal Tort Claims Act. The Fifth Amendment to the Constitution prohibits the taking of private property for public use without just compensation. To us the claim of appellants against the United States are founded upon the Constitution, and the acts of the United States complained of are in the nature of inverse condemnation. Since the claims of each appellant against the United States exceed $10,000.00, the Court of Claims has exclusive jurisdiction to hear or determine the claims against the United States. See *United States v. Causby,* 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), and *United States v. Gerlach Livestock Co.,* 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231 (1950).

While the Fifth Amendment is only applicable to the Federal government, the Fourteenth Amendment would make such a holding applicable to the Municipality of Anchorage in this case. *Griggs v. Allegheny County,* 369 U.S. 84 7 L.Ed. 585 (1962). The Alaska Supreme Court adopted the holding in *Myers,* 323 F.2d 580, 582-83 (9th Cir. 1963), and in *State Department of Highways v. Crosby,* 410 P.2d 724, 728-29 (Alaska 1966).

For these reasons, the Municipality believes that operation and maintenance of the road across Mrs. Tabbytite's property as a public road by the Municipality since unification in September, 1975 constitutes a taking in the nature of inverse condemnation and that such taking is allowed by 25 U.S.C.A. § 357 so long as just compensation is paid to the allottee and the issue of just compensation is adjudicated in federal, rather than state, courts.

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in

> fee may be condemned and the money awarded as damages shall be paid to the allottee.

This is a power available to a body empowered to exercise eminent domain under state law, which is an alternative to securing a permit from the Secretary of the Interior pursuant to 25 U.S.C.A. § 311. *United States v. Minnesota,* 113 F.2d 770, 773 (9th Cir. 1940); *Nicodemus v. Washington Power Company,* 264 F.2d 614 (9th Cir. 1959); *Transok Pipeline Company v. Darks,* 565 F.2d 1150, 1153 (10th Cir. 1977) *cert. denied,* 435 U.S. 1006 (1978). State law governs whether the condemning agency is empowered to exercise this power and the manner of the proceeding so long as the issue of just compensation is adjudicated in federal, rather than state, court. *United States v. Minnesota, supra; Nicodemus v. Washington Power Company, supra; United States v. Oklahoma Gas & Electric Co.,* 127 F.2d 349, 354-55, *aff'd,* 87 L.Ed. 716 (10th Cir. 1942); *City of Okemah, Okl., v. United States,* 140 F.2d 963, 966 (10th Cir. 1944).

Alaska state law allows exercise of the power of eminent domain through inverse condemnation or a taking in the nature of inverse condemnation. *State Department of Highways v. Crosby,* 410 P.2d 724, 728-39 (Alaska 1966); *See City of Anchorage v. Nesbett,* 530 P.2d 1324, 1334-36 (Alaska 1975); *Myers v. United States,* 323 F.2d 580, 582-83 (9th Cir. 1963); *Wickwire v. City and Borough of Juneau,* 557 P.2d 783 (Alaska 1976).

In *Crosby, supra,* as in *Myers, supra,* the fact situation was strikingly similar to that in the present case. In each case, a public body with powers of eminent domain constructed or maintained a road across private land in a mistaken belief that it was entitled to do so. In *Myers* and *Crosby,* the mistake concerned section line rights-of-way. In the present case, the mistake concerned a belief that an easement of necessity existed across Mrs. Tabbytite's land, a belief with which the District court concurred until reversal by the Ninth Circuit Court of Appeals in April, 1976. In *Myers v. United States,* 323 F.2d 580, 582-83 (9th Cir. 1963) the United States, through the Bureau of Public Roads, constructed a road in Alaska on

the belief that it was situated upon a section line right-of-way. The property owners sued for injunction and trespass. The court held:

> It is clear to us that the claims of the appellants asserted against the United States are to recover damages for the taking for public use of property claimed to be owned by the appellants, without the institution of condemnation proceedings. The repeated characterization by the appellants of the taking by the United States as one of trespass and the commission of waste upon the lands in question does not convert the claims to cases sounding in tort and thereby confer jurisdiction on the District Court under the Federal Tort Claims Act. The Fifth Amendment to the Constitution prohibits the taking of private property for public use without just compensation. To us the claim of appellants against the United States are founded upon the Constitution, and the acts of the United States complained of are in the nature of inverse condemnation. Since the claims of each appellant against the United States exceed $10,000.00, the Court of Claims has exclusive jurisdiction to hear or determine the claims against the United States. See *United States v. Causby,* 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), and *United States v. Gerlach Livestock Co.,* 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231 (1950).

While the Fifth Amendment is only applicable to the Federal government, the Fourteenth Amendment would make such a holding applicable to the Municipality of Anchorage in this case. *Griggs v. Allegheny County,* 369 U.S. 84 7 L.Ed. 585 (1962). The Alaska Supreme Court adopted the holding in *Myers,* 323 F.2d 580, 582-83 (9th Cir. 1963), and in *State Department of Highways v. Crosby,* 410 P.2d 724, 728-29 (Alaska 1966).

For these reasons, the Municipality believes that operation and maintenance of the road across Mrs. Tabbytite's property as a public road by the Municipality since unification in September, 1975 constitutes a taking in the nature of inverse condemnation and that such taking is allowed by 25 U.S.C.A.

§ 357 so long as just compensation is paid to the allottee and the issue of just compensation is adjudicated in federal, rather than state, courts.

IF A TAKING IN THE NATURE OF INVERSE CONDEMNATION HAS OCCURRED, INJUNCTIVE RELIEF IS INAPPROPRIATE

If there has been a taking through inverse condemnation or in the nature of inverse condemnation, issuance of an injunction is inappropriate since the property owner has an adequate remedy at law: recovery of just compensation. *Hurley v. Kincaid,* 285 U.S. 95, 76 L.Ed. 637, 643 (1932); *State Department of Highways v. Crosby,* 410 P.2d 724, 728-29 (Alaska 1966); *See Loma Portal Civic Club v. American Airlines, Inc.,* 394 P.2d 548, 552 (Cal. 1964); *Garden Water Corp. v. Fambrough,* 531 Cal.Rptr. 862 (Cal. App. 1966); *Los Angeles Brick and Clay Products Co. v. City of Los Angeles,* 141 P.2d 46, 53 (Cal. App. 1943).

Probably the leading case discussing the propriety of an injunction when land has been taken for a public purpose without use of formal condemnation proceedings is *Hurley v. Kincaid, supra.* There, land was taken by the United States through flooding. The Supreme Court held:

> We may assume that, as charged, the mere adoption by Congress of a plan of flood control which involves an intentional, additional, occasional flooding of complainant's land constitutes a taking of it—as soon as the Government begins to carry out the project authorized. [citations omitted] If that which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract, since the validity of the Act and the authority of the defendants are conceded. [citations omitted] The compensation which he may obtain in such a proceeding will be the same as that which he might have been awarded had the defendants instituted the condemnation proceedings which it is contended the statute requires. Nor is it material to inquire

> now whether the statute does so require. For even if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's land, the illegality, on complainant's own contention, is confined to the failure to compensate him for the taking, and afford no basis for an injunction if such compensation may be procured in an action at law. The 5th Amendment does not entitle him to be paid in advance of the taking. [citations omitted]

The Alaska Supreme Court has also held that an injunction is improper under these circumstances. The Court stated in *State Department of Highways v. Crosby,* 410 P.2d 724, 729 (Alaska 1966):

> This statement might be construed as meaning that the state must first institute condemnation proceedings in accordance with statute and rule before it may enter upon and utilize the property that it has already appropriated. We believe that such a requirement is unrealistic. The property has already been taken. *It would serve no useful purpose to insist now that the state must initiate a condemnation action and take the initial steps required by law and rule as a condition to the exercise of its power of eminent domain. What is at issue here is the matter of awarding appellees just compensation. Such compensation may be determined in this proceeding, utilizing so far as practicable the statutory requirements and procedural steps relating to the condemnation action, as well as it could be determined in a separate condemnation action to be instituted by the state.* Since the evident purpose of the injunction was to require the state, if it chose to utilize appellees' property, to institute a separate condemnation action to acquire such property, and *since we have held that such action is unnecessary, the injunction was not appropriate and should be dissolved.* [emphasis added.]

Both *Hurley, supra,* and *Crosby, supra,* should be controlling in this case concerning injunctive relief. An injunction is not appropriate if there has been a taking in the nature of inverse condemnation. Moreover, issuance of an injunction would im-

pose a grave hardship upon innocent persons who live in Glen Alps who must use the road to go to work, return to their homes and receive medical assistance or fire protection. A proportionate hardship is not imposed upon Mrs. Tabbytite; if there has been a taking in the nature of inverse condemnation, she has an adequate remedy at law: award of just compensation, which can be adjudicated in this action upon remand.

IF THERE HAS BEEN A TAKING IN THE NATURE OF INVERSE CONDEMNATION, TRESPASS DAMAGES FOR USE OF THE ROAD AFTER SUCH TAKING ARE INAPPROPRIATE

Clearly, if a taking in the nature of inverse condemnation has taken place, trespass damages, if any, should not be assessed against persons using the road after the date of taking. The Ninth Circuit Court of Appeals had held that trespass damages do not lie after there has been a taking in the nature of inverse condemnation. *Myers v. United States,* 323 F.2d 580, 582-83 (9th Cir. 1963).

While the Fifth Amendment is only applicable to the federal government, the Fourteenth Amendment would make such a holding applicable to the City of Glen Alps and the Municipality of Anchorage in this case. *Griggs v. Allegheny County,* 369 U.S. 84, 7 L.Ed. 585 (1962).

Under the doctrine of *Erie Railroad v. Tompkins,* 304 U.S. 64, 82 L.Ed. 1188 (1938), state law controls a tort such as trespass and damages therefore. The Alaska Supreme Court, in *State Department of Highways v. Crosby,* 410 P.2d 724, 728-29 (Alaska 1966), has adopted the holdings in *Myers,* 323 F.2d 580, 582-83 (9th Cir. 1963), that trespass damages will not lie when there has been a taking in the nature of inverse condemnation. It has ruled similarly in *Wickwire v. City and Borough of Juneau,* 557 P.2d 783 (Alaska 1976).

Myers, 323 F.2d 580, 582-83 (9th Cir. 1963), *Crosby,* 410 P.2d 724, 728-29 (Alaska 1966), and *Wickwire,* 557 P.2d 783 (Alaska 1976) are controlling in this case concerning the inappropriateness of trespass damages after there has been a taking

in the nature of inverse condemnation. This would not affect the right of the United States and Mrs. Tabbytite to seek trespass damages against individual defendants prior to the date of taking.

CONSTRUING 25 U.S.C.A. § 357 TO PRECLUDE A CAUSE OF ACTION IN THE NATURE OF INVERSE CONDEMNATION TO INDIAN ALLOTTEES IN SEVERALTY WOULD HARM INDIANS AS A CLASS.

The United States and Tabbytite argue, repeatedly, that statutes should be construed in every reasonable way to favor the Indian. However, they also present the curious, shocking argument that the entire class of Indians who have been allotted lands in severalty should be denied a constitutional cause of action in the nature of inverse condemnation which is afforded to all other American citizens. The Ninth Circuit recognized this danger to Indians, as a class, when it observed:

> To us it seems a contradiction to deny Indians and beneficial owners a cause of action for damages under the guise of protecting their rights.

United States v. Clarke, 590 F.2d 765, 767 (1979) (R. App. A).

United States and Tabbytite, for reasons of their own choosing, argue that the remedies of trespass and injunction are adequate and that a cause of action in inverse condemnation or in the nature of inverse condemnation should be denied to the entire class of Indian allottees. If the intrusion upon the allotment lands is not of such magnitude as to constitute a taking under the laws of the state in question, the Ninth Circuit recognized that its holding "does not prevent the United States and the allottee from seeking immediate relief from unlawful intrusions upon land, whether the intrusion is done by trespass by a public or private entity." *United States v. Clark, supra.*

Trespass and injunction, however, may be inadequate remedies. If the plaintiff in *United States v. Causby,* 328 U.S. 256 (1946), whose land was subject to over flight, had been an Indian allottee rather than a non-Indian chicken farmer he

would be denied the relief afforded in that case if a cause of action in the nature of inverse condemnation were not available. The same result would obtain, if the United States and Tabbytite theories prevail, in *Griggs v. Allegheny County,* 369 U.S. 84 (1962). If the plaintiff whose land was inundated or about to be inundated in *United States v. Cress,* 243 U.S. 316 (1917) or *Hurley v. Kincaid,* 285 U.S. 95 (1932) were an Indian allottee and the arguments of the United States and Tabbytite were to prevail, he would be denied just compensation through a cause of action in the nature of inverse condemnation although his lands have been taken, in fact, by the rising waters.

25 U.S.C. § 357 provides that both state substantive and procedural law control concerning allotment land which is "condemned." Therefore, the breath of the cause of action in the nature of condemnation will vary according to the laws of each state. An illustration of the almost boundless scope of the inverse cause of action which the United States and Tabbytite seek to deny to Indian allottees can be illustrated by *Albers v. County of Los Angeles,* 390 P.2d 129 (Cal. 1965).

Article 1, Section 14 of the California Constitution provides:

> Private property shall not be taken or damaged for public use without just compensation.

This provision is identical to Article 1, Section 18 of the Alaska Constitution and is similar to the "taking or damage" provisions of twenty-four other state constitutions. 2 *Nichols on Eminent Domain,* § 644 (Revised 3rd Add. 1976).

Albers v. County of Los Angeles, supra involves the Portagese Bend area of the Palos Verdes Hills, a southerly coastline and peninsula overlooking the Pacific Ocean on the western side of Los Angeles. In the 1950's the County of Los Angeles extended Crenshaw Boulevard west to the Pacific Coast Highway. Part of the road crossed a known prehistoric slide area which all engineering studies indicated had been at rest for several thousand years. The trial judge specifically "found an absence of negligence or contributory negligence on the part of any party, and . . . also found that the evidence

did not include the necessary elements of a nuisance . . . ." *Id.* at 132.

When the highway was constructed, there was no physical invasion of the property of the plaintiffs by the county. The road was constructed in as professionally responsible a manner as such a road could be constructed. Unfortunately, after the road was built, houses and lands several hundred yards down hill from the road began to slide toward the ocean. This consequence was not foreseeable. However, plaintiffs were awarded $5,360,000.00 in damages as a consequence of a claim in inverse condemnation.

In affirming the award and judgment, the Supreme Court of California recognized a total absence of negligence, nuisance, forseeability or any other ground upon which recovery in tort could be predicated, but affirmed the award on the basis of inverse condemnation. It ruled:

> For these reasons we conclude that in the appeal of the county the judgments should be affirmed on the ground that with the exceptions stated in *Grey, supra,* and *Archer, supra,* any actual, physical injury to real property proximately caused by the improvement as deliberately designed and constructed as compensable under Article 1, Section 14, of our Constitution whether foreseeable or not. *Id.* at 147.

In short, the court allowed recovery in inverse condemnation for $5,360,000 on the basis of strict liability because a public improvement had been made and private property had been proximately damaged as a consequence of that project. There are two exceptions to this doctrine of strict liability:

1. If the damage "involved noncompensable damages 'inflicted in the proper exercise of the police power'."

2. If it were "encompassed in those cases in which the state at common law 'had the *right* to inflict the damage' (such as person defending his property against rampant flood water)." *Holtz v. Superior Court of City and County of San Francisco,* 475 P.2d 441, 446 (Cal. 1970).

In *Albers, supra,* the property owners whose land and homes had been damaged as a consequence of a public project would have been precluded from recovery through trespass, nuisance, negligence or any other action in tort. Since there was no physical entry upon their lands by the government agency, an injunction would have been of little help. Only through a cause in inverse condemnation were they able to secure just compensation for damage to their property proximately caused by a public project. (Whether the same would have obtained under a purely "taking" constitution is uncertain. Possible, the same result would have obtained. In California, physical invasion is not a prerequisite to compensation. *Varjabedian v. City of Madera,* 527 P.2d 43, 50 (Cal. 1977). Yet the United States and Tabbytite would deny the entire class of Indian allottees this cause of action under the guise of protecting their rights.

Daniel R. Mandelker, "Inverse Condemnation: The Constitutional Limits of Public Responsibility," 1966 *Wisconsin Law Review* 3 thoroughly discusses another aspect and advantage of allowing an inverse condemnation cause of action. A cause of action in inverse condemnation or in the nature of inverse condemnation allows a cause of action for taking or damage occurring *after* a formal, judicial condemnation has occurred. The implications of this can be illustrated by *Grant v. State of Alaska*, 560 P.2d 36 (Alaska 1977). There, land was denied access to Gastineau Canal, an arm of the Pacific Ocean by a highway project. The taking was effected through an inverse condemnation action, although the results in this case would have been the same if it had been through a formal, judicial condemnation action. After the original taking occurred and settlement was made on the basis that limited access would be allowed to the Pacific through culverts placed under the highway, the culverts collapsed. The State Highway Department decided that it would be too expensive to replace the culverts, so it eliminated them. The highway was rebuilt without the culverts in place and the land was completely landlocked from the Pacific. After the initial settlement, but before this development, the party who consented the original

settlement with the Highway Department sold to another party who relied upon the culverts as part of the purchase price. Upon learning that the culverts would no longer be installed as a consequence of subsequent highway design change, he brought an action in inverse condemnation and was allowed recovery. If under the same circumstances, an Indian allottee had been the land owner throughout the proceedings and after settlement of the original case, in a formal, judicial proceeding, the highway design were changed and if no inverse cause of action were to lie, the allottee would be without remedy.

25 U.S.C. § 357 should be construed to favor the Indian allottee by affirming his right to a cause of action in the nature of inverse condemnation if the laws of the state in question so allow.

RESPONSE TO BRIEF OF THE UNITED STATES

THE WORD "CONDEMNED," AS USED IN 25 U.S.C. § 357, IS NOT LIMITED TO A FORMAL, JUDICIAL PROCEEDING IN EMINENT DOMAIN WHICH IS FILED BY THE STATE OR POLITICAL SUBDIVISION PRIOR TO ENTRY UPON THE LAND.

When 25 U.S.C. § 357 was enacted in 1901, the words "condemned" or "condemnation" did not refer exclusively to a judicial proceeding in eminent domain filed prior to entry upon land which is to be acquired through exercise of power of eminent domain. Three methods of "condemnation" were prevalent among the States and Federal Government in 1901:

1. Formal, judicial eminent domain proceeding, 6 Nichols on Eminent Domain § 24.113; 26.1-26.732 (Rev. 3rd Ed. 1976).

2. Administrative proceedings whereby the condemning agency customarily filed a map indicated the area taken with the applicable recording district, leaving the property owner with the burden of bringing an action for just compensation before the appropriate administrative or judicial tribunal; 1 Nichols on Eminent Domain § 1.22 [11], [12]; 4.101; 6 Nichols § 25.1-25.7 (Rev. 3rd Ed. 1976).

3. What the United States has called "seizure" and what has become known as the taking in the nature of inverse condemnation. Indeed, this is one of the oldest forms of condemnation. Its essence, then couched as an implied contract to pay just compensation, rather than by the direct words "inverse condemnation," was recognized by this Court at least as early as 1872 in *Pumpelly v. G.B.M. Canal Company,* 80 U.S. 166, 20 L.Ed. 557 (1872). In 1864, the United States government took private property for public purpose without the prior institution of eminent domain proceedings, with the Supreme Court relying upon an implied promise to pay just compensation. *United States v. Great Falls Manufacturing Company,* 112 U.S. 645, 656-657, 28 L.Ed. 846, 850 (1884).

The origins of state power to exercise eminent domain power is set forth in 1 Nichols on Eminent Domain § 1.23(1) (Rev. 3rd Ed. 1976):

> When the people of the American colonies became independent of Great Britain, each colony became a sovereign state, and by the mere fact of sovereignty assumed absolute control over the property within its jurisdiction.
>
> In *Munn. v. Illinios,* 94 U.S. 113, 124, 24 L.Ed. 77, the Supreme Court said:
>
> "When the people of the United Colonies separated from Great Britain, they changed the form but not the substance of their government. They retained for the purposes of government all the powers of the British Parliament and through their state constitutions or other forms of social compact undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property."
>
> To each state thus passed all the powers of king and Parliament, *Dartmouth College v. Woodward,* 4 Wheat U.S. 518, 4 L.Ed. 629; *Cherokee Nation v. Georgia,* 5 Pet. U.S. 1, 8 L.Ed. 25; *Munn v. Illinois, supra,* to be exercised as the people of the state saw fit. Upon the assumption of such sovereign powers each state was vested with the general power of eminent domain. *Dalche v. Board of Commissioners,* 49 F(2) 374.

The power of eminent domain, as an instance of sovereignty to states admitted to the Union after the thirteen original states was reserved through the Tenth Amendment of the Constitution and the "Equal Footing" Doctrine. It was recognized by this Court in *Cincinnati v. Louisville and N.R. Company,* 223 U.S. 390, 56 L.Ed. 481 (1912). Given this diversity of eminent domain proceedings among the states in 1901, it is not surprising that Congress in enacting § 357 elected to allow the laws of each state to control the substance and procedure of "condemnation" of Indian allotment lands in severalty.

Origins of the powers of the federal government with respect to eminent domain powers are discussed in 1 Nichols on Eminent Domain § 1.24 [1]-[5] (Rev. 3rd Ed. 1976).

The key word in 25 U.S.C.A. § 357 is "condemned." The United States correctly argues, that this word, occurring in a statute enacted on March 3, 1901, should be construed if possible in accordance with contemporary usage. While the legislative history of the particular statute is of little help, there is a wealth of statutory language enacted in the twenty-year periods both preceding and following the act of March 3, 1901 utilizing the word "condemn" or, even more specifically, "condemnation under judicial process."

In 1882, Congress enacted a statute entitled "An Act to Increase the Water Supply of the City of Washington and for Other Purposes". The text of the statute is set forth at length in *Great Falls Manufacturing Company v. Garland,* 124 U.S. 581, 584-588, 31 L.Ed. 527, 528-529 (1888) and (R: App C). After authorizing the Secretary of War and the Attorney General of the United States to acquire such property as might be necessary for construction of a dam on the Potomac River in the vicinity of the Great Falls, it provided in relevant part:

> And provided further: That if it shall be necessary to resort to condemnation, the proceeding shall be as follows: . . .

Provision was then made for preparation of a map and survey describing the project, notification of any potential claimants, appointment of appraisers to report upon evaluation of the property and made provision for filing of a petition to the Court of Claims of the United States of any person who declined to receive the value set by the appraisers. It further set forth terms for right of entry upon the premises and vesting of title:

> Upon the publication of the notice as above directed, the Secretary of War may take possession of the premises embraced in the survey and map, and proceed with the constructions herein authorized; and upon payment being made therefore, or, without payment upon the expiration

> of the times above limited, without the filing of a petition, absolute title to the premises shall vest in the United States. (U.S. at 587, L.Ed. at 529).

After the unhappy property owners filed their petition with the Court of Claims, contested constitutionality of the statute this Court ruled that, although there had been no judicial proceeding prior to the United States entry upon the land, the act of taking, coupled with the provision allowing for subsequent action by the property owners to secure just compensation constituted condemnation of the land. The Court stated.

> The present inquiry in respect to land or water rights taken from the plaintiff must therefore be conducted with reference to their value—not in 1863 when the government declined to take them, but in 1883 *at the time of their being condemned for public use under the act of 1882.* (U.S. at 595, L.Ed. at 532). [Emphasis added.]

Therefore, the 1882 statute must be construed to hold that congressional intent was that if the land were taken for public purpose and the property owner was paid just compensation in a subsequent action filed by him, the land was "condemned."

On September 27, 1890 (26 Stat. 492) Congress authorized establishment of a public park in the District of Columbia. This Court in *Shoemaker v. United States*, 147 U.S. 282, 284-285, 37 L.Ed. 170, 177 (1893) found that:

> The act provides that the whole tract be selected and *condemned*, shall not exceed two thousand acres and that the cost thereof shall not be in excess of a certain amount appropriated.

Relevant portions of the statute provided:

> Sec. 3. That the said commission shall cause to be made an accurate map of said Rock Creek Park showing the location, quality, and character of each parcel of private property to be taken for such purpose, with the names of the respective owners inscribed thereon, which map shall be filed and recorded in the public records of the District of Columbia, and from and after the date of filing said

map the several tracts and parcels of land embraced in said Rock Creek Park *shall be held as condemned* for public uses, and the title thereof vested in the United States subject to payment of just compensation, to be determined by said commission, and approved by the President of the United States: Provided, that such compensation be accepted by the owner or owners of the several parcels of land. [Emphasis added.] . . . .

Sec. 4. That said court may direct the time and manner in which the possession of the property *condemned* shall be taken or delivered, and may, if necessary, enforce any order or issue any process for giving possession. [Emphasis added.] (The entire text quoted is found in R: App D).

The act left determination of just compensation to the President, not a judicial tribunal. (U.S. at 288, L.Ed. at 178). This court held that such proceeding constituted condemnation.

The most persuasive evidence of contemporary usage concerning the intention of Congress in using the word "condemned" which is used in 25 U.S.C. § 357, Act of March 3, 1901, was an act, passed by the same Congress, authorizing condemnation in Section 7 of the Reclamation Act of 1902, 32 Stat. 389, 43 USC § 421. (R: App. E) The Ninth Circuit Court of Appeals discussed this section at length in *State v. Rank,* 293 F.2d 340, 354-355 (1961), and was affirmed in this holding by this Court in *Dugan v. Rank,* 372 U.S. 609, 619, 10 L.Ed. 15, 23 (1963):

This contention is based upon language contained in § 7 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 421:

"That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States *by purchase or by condemnation under judicial process*, and to pay from the

reclamation fund the sums which may be needed for that purpose***." [Emphasis supplied.]

The Supreme Court, however, has recognized this section as authorizing a taking by physical seizure. In United States v. Buffalo Pitts Company, 1913, 234 U.S. 228, 233, 34 S.Ct. 840, 842, 58 L.Ed. 1290, it was stated:

"Furthermore, the government was authorized by § 7*** under which this improvement was being made, to acquire any property necessary for the purpose, and, if need be, to appropriate it."

Furthermore, in legislation specifically dealing with the Central Valley Project, Congress has used different and less restrictive language. The project was authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935, 49 Stat. 115, and the First Deficiency Appropriation Act, 1936, 49 Stat. 1622. By the Rivers and Harbors Act of 1937, 50 Stat. 850, the project was expressly reauthorized. There it is provided that the Secretary *"may acquire by proceedings in eminent domain, or otherwise,* all lands, rights-of-way, water rights, and other property necessary for said purposes***." [Emphasis supplied.]

In our view, it cannot be said that Congress intended with respect to the Central Valley Project that exercise of the power of eminent domain was to be exclusively through judicial proceedings and that physical seizure and inverse condemnation were not to be available.

In affirming the Ninth Circuit's holding concerning the impact of Section 7 of the Reclamation Act of 1902, this Court stated:

The Court of Appeals correctly held that the United States was empowered to acquire the water rights of respondents by physical seizure. *Dugan v. Rank,* 372 U.S. 609, 619, 10 L.Ed. 15.23 (1963).

This holding is particularly significant in determining congressional intent of utilizing the word "condemned" in 25 U.S.C.

§ 357. Not only is the phrase "by condemnation under judicial process" far more restrictive concerning procedure than the mere word "condemned" which occurs in § 357. The Supreme Court decision in *United States vs. Buffalo Pitts Company,* 234 U.S. 228, 233, 58 L.Ed. 1290 (1913) was highly contemporaneous with the times in which § 357 was adopted, and allowed the far more restrictive language of "condemnation under judicial process" to authorize acquisition of property by physical seizure, or as it is now known, a taking in the nature of inverse condemnation.

It should be further noted that the language "by purchase or by condemnation under judicial process" is identical to the language used in the General Federal Condemnation Act of August 1, 1888, 40 U.S.C. § 257. (R. App. F) This was the first general act authorizing federal condemnation, nationwide. 1 Nichols on Eminent Domain, § 1.24[5] note 51 (Rev. 3rd Ed. 1976).

In *Campbell v. United States,* 266 U.S. 368, 370-371, 69 L.Ed. 328, 330 (1924) this Court examined a statute in which the President and Secretary of War were authorized to "purchase or condemn the lands." The land in question had been seized for purposes of construction of a nitrate plant during World War I. The words "purchase or condemn the lands," was sufficient to sustain this court's finding that "the taking was under the sovereign power of eminent domain," thereby relegating the former property owner to bringing a separate action to enforce the implied promise of the United States to compensate him for his loss. Impliedly, the words "purchase or condemn" were sufficient to justify exercise of the eminent domain power, condemnation, by physical seizure.

This abundance of contemporary statutory usage in which the words "condemned" and "condemn under judicial proceeding" have been construed to allow a taking through "physical seizure," as the United States uses the term or a taking in the nature of inverse condemnation, as it is commonly known today, is abundant evidence that when Congress enacted 25 U.S.C. § 357 it intended that the eminent domain laws of the state in which the property was situated should con-

trol. If state law allowed exercise of eminent domain powers only through formal, prior, judicial proceedings state law would control. The same would obtain for a state which allowed exercise of condemnation through administrative proceedings, as well as a state law which allowed exercise of condemnation powers through either formal, judicial proceedings or a proceeding in the nature of inverse condemnation. "Condemnation" and "eminent domain" are clearly synonymous terms, for a sovereign power, of which "inverse condemnation" is but a subspecie.

The contemporaneous statutes enacted, and construed above are far more reliable indices of congressional intention in 1901 than the United States' attempts to construe the word "condemned," as it was written in 1901 by its interpretation of the Uniform Relocation Assistance in Real Property Policies Act of 1970, 42 U.S.C. § 4601 et seg., an act which has passed some sixty-nine years after the statute in question. Not only is the action of a congress acting sixty-nine years after the fact a questionable guide to legislative interpretation; the 1970 Act was intended to affect a fundamental change in the direction and refinement of the Condemnee's substantive and procedural rights. 1 *Nichols on Eminent Domain* § 1.14[5]; (Rev. 3rd Ed. 1976); 6 *Nichols on Eminent Domain* 34.1-34.3[26].

The cases cited on pages 11 and 12 of the United States Brief provide no authority for the assertion that when Congress utilized the word "condemned" in 25 U.S.C. § 357, this term excluded a taking through physical seizure with a subsequent action to be brought by the allottee to recover just compensation under an implied contract or, what is now known as inverse condemnation.

Winslow v. Baltimore and Ohio Railroad Company, 188 U.S. 646, 47 L.Ed. 635 (1903) offers no assistance. There, an action was brought by the railroad against a private individual to establish the validity of a lease and compel specific performance to sell. The land was situated in the District of Columbia, with the action being brought in the District of Columbia.

Exercise of eminent domain powers, apparently, was not plead. Summary of Briefs, 47 L. Ed. 634, 638 (1903).

While the Supreme Court did not allow adjudication of just compensation in the same action, ruling that "the proceeding to condemn is otherwise provided by law . . ." it gave no reasons for this holding nor did it allude to the provisions of law which were applicable.

United States v. Lee, 106 U.S. 196, 27 L.Ed. 171 (1882) is no authority for asserting that land may not be "condemned" through an action in the nature of inverse condemnation. There, the United States entered upon land now used for Arlington Cemetery without lawful authority. It made no attempt to offer just compensation or adjudicate just compensation, either in the pending action or by separate proceeding. In allowing ejectment of the United States, the court ruled that the United States had not exercised its powers of eminent domain because, although it occupied the property, it refused to allow exercise of the eminent domain powers through failure to offer just compensation or allow adjudication in this or other proceedings. In effect, the court said to the United States "Pay or get out. Choose."

On page 12 of its brief, the United States cites five contemporaneous state cases alleging that "the states limited condemnation to judicial proceedings . . ." (Pet. Brief: 11). Curiously, four of the five cases cited are classic inverse condemnation cases.

In *Fries v. Wheeling and Lake Erie Railroad Company,* 46 N.E. 516 (Ohio 1897), a railroad company entered upon land with verbal consent of the owner and verbally promised to pay for the land. After it built its track, it refused to pay. The Supreme Court of Ohio ruled that the land owner's remedies were governed by a specific Ohio statute which gave the property owner three possible remedies: 1) ejectment 2) the right to compel an appropriation; or 3) a suit to recover compensation. Ejectment was denied because the property owner consented to entry and was, thus, estopped.

The right to compel compensation, was in essence, a action for breach of contract as a consequence of failure of consideration.

The right to compel an appropriation was, simply, a cause of action to compel appropriation through payment of just compensation—a cause of action that is now known as inverse condemnation. The only difference between suing to recover compensation or to compel an appropriation was the measure of recovery. If the property owner sued to compel an appropriation, he could recover severance damages, as well as compensation for the part taken. If he sued for compensation, he would receive compensation for only the part taken, with no damages to the remainder. In short, the case was limited to a specific Ohio statute and authorized a cause of action in what is now known as inverse condemnation.

Stewart v. Milwaukee Electric Railroad and Lighting Company, 86 N.W. 163 (Wis. 1901) was an appeal "by defendant (the railroad company) from an order appointing commissioners in *condemnation proceedings* and denying defendant's motion to dismiss" (164). [Emphasis added.]

An injunction was not allowed. A 1897 statute gave either party the right to file a condemnation proceeding.

Here, the property owner brought the *"condemnation proceedings"* after the railroad had entered upon the land without either payment or prior filing of an eminent domain proceeding. [Emphasis added.]

Stewart, supra, is a classic case in inverse condemnation.

Charnley v. Shavano Water-Power and River-Improvement Company, 85 N.W. 507 (Wis. 1901) was a suit by a property owner to appoint commissioners for the purpose of determining just compensation resulting from inundation of his lands by a company which possessed the power of eminent domain. There was no holding requiring the company to file a separate action in eminent domain. This, also, was the classic fact pattern in inverse condemnation.

Parrish v. Yorkville, 79 S.E. 635 (S.C. 1913) resulted from the town of Yorkville dumping sewage into a stream which crossed Parrish's land, thereby polluting it.

The South Carolina statutes provided the appropriate procedure to "condemn." The municipal corporation would appoint an arbitrator to determine just compensation. The property owner would appoint a second arbitrator and these would appoint a third. This board would determine just compensation. If either appealed to court, the issue would be resolved by trial by jury.

The court held that the property owner, as well as the municipal corporation, could compel appointment of the arbitrators to determine just compensation after the land had already been taken for public purpose. "We conclude, therefore, that plaintiff has a remedy by condemnation under the statute." (636). It, therefore, was unnecessary to determine whether a tort action was barred by sovereign immunity. Again, "condemnation" as used above, is synonymous with a taking in the nature of inverse condemnation.

Russell v. Chicago and Milwaukee Electric Railway Company, 68 N.E. 727 (Ill. 1903) offers little guidance. A railway was placed in a "street" which had not been properly dedicated by plat and which, actually belonged to the plaintiff. The court ruled that a mandatory injunction should be issued ordering the railroad to remove the facilities unless it were to "institute condemnation proceeding . . ." The court did not specify the nature of the "condemnation proceedings" nor the date of valuation.

United States v. Lynah, 188 U.S. 445, 467, 478-469, 47 L.Ed. 539, 147-548 (1903) offers no support for the assertion that takings in the nature of inverse condemnation "were deemed truly exceptional at the turn of the century" and a sharp distinction was made between such "takings" on the one hand and "condemnation" on the other (Pet. Brief 12).

The principal statute which authorized the United States to undertake the public improvement, which ultimately, inundated the plaintiff's land without prior institution of formal

judicial eminent domain proceedings, 25 Stat. at L. 194, Chap. 194, 1888 provided:

> An act to facilitate the prosecution of works projected for the improvement of rivers and harbors.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the *acquirement by condemnation* of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; *such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted:* Provided, however, That when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of War, shall be reasonable, he may purchase the same at such price without further delay: And provided further, That the Secretary of War is hereby authorized to accept donations of lands or materials required for the maintenance or prosecution of such works. [Emphasis added.] [R. App. G]

The statute allowed the Secretary of War to acquire land for the project "by condemnation" with "such proceedings to be prosecuted in accordance with the laws of the States" relating to the condemnation of property. Yet, this Court in *United States v. Lynah, supra,* allowed plaintiff's land to be taken for public purpose through seizure if just compensation was paid in a subsequent action under "implied contract" pursuant to the authority of this statute which allowed "condemnation." The decision in *United States v. Lynah, supra,* is contemporaneous with usage concerning the word "condemnation" at the time Congress enacted 25 U.S.C.A. § 357 in 1901 and allows "condemnation" through what is, in essence, an action in the nature of inverse condemnation (U.S. at 474, L.Ed. at 550).

As the United States has indicated (Pet. Brief 13-14) passage of title if there is a taking in the nature of inverse condemnation is contingent upon payment of just compensation. As this Court indicated in *United States v. Lee,* 106 U.S. 196, 27 L.Ed. 171 (1882), the condemning agency must choose: exercise of its eminent domain powers through payment of just compensation either before or after the date of physical taking, or get out. In Alaska, the date of valuation is the date of entry upon the property. *City of Anchorage v. Nesbett,* 530 P.2d 1324, 1334-1336 (1975). In this respect it is identical to the date of valuation of the United States. *United States v. Dow,* 357 U.S. 17 (1958).

On pages 15-16 of its brief, the United States cites a 1967 opinion of the Alaska Attorney General to the effect that a taking in the nature of inverse condemnation is not favored in the State of Alaska. It should be noted, that opinions of the Attorney General in the State of Alaska have little legal effect and are not recognized as persuasive authority by the courts of this state. Second, that a taking in the nature of inverse condemnation is a valid condemnation upon paying just compensation has been recognized by the Alaska Supreme Court since 1966 without exception. *Alaska Department of Highways v. Crosby,* 410 P.2d 724, 729 (Alaska 1966); *City of Anchorage v. Nesbett,* 530 P.2d 1324, 1334-36 (Alaska 1975); *Wickwire v. City and Borough of Juneau,* 557 P.2d 783 (Alaska 1976); *Grant v. State,* 560 P.2d 36 (Alaska 1977).

It should be noted that the Municipality began maintenance of the road upon unification in September, 1976 in good faith, then being bound by a final judgment of the United States District Court for the District of Alaska that the road was a public thoroughfare, as an easement of necessity (See Statement, Facts, Par. 7). Since 1976 the Municipality has been willing to adjudicate just compensation in this action (*Id.* Par. 9).

CONSTRUING THE WORD "CONDEMNED" IN 25 U.S.C. § 357 WOULD NOT LEAD TO "ILLOGICAL RESULTS."

On pages 16-19 of its brief, the United States alleges that reading 25 U.S.C. § 357 to authorize takings by inverse condemnation would lead to illogical results. Three grounds are asserted for this proposition:

1. Allowing a taking in the nature of inverse condemnation would contravene the doctrine of *Minnesota v. United States,* 305 U.S. 382 (1939) by allowing a situation in which "a state subdivision was permitted to acquire allottee land without resort to *any* court" (Pet. Brief at 17).

2. Allowing a taking in the nature of inverse condemnation "would permit states, under certain circumstances, to acquire allotted lands without paying of any compensation . . ." because, allegedly, an action to procure just compensation could be barred by a statute of limitations, thereby allowing acquisition of title to lands without any compensation.

3. Allowing "condemnation" of allotment lands through a taking in the nature of inverse condemnation would impose a burden upon Indian allottees because of the Eleventh Amendment.

The assertion that a state or municipality could acquire title to allotment land without payment of just compensation or "without resort to *any* court . . ." is without merit. As this court has ruled repeatedly, e.g., *United States v. Lee*, 106 U.S. 196, 27 L.Ed. 171 (1882); *United States v. Lynah*, 188 U.S. 445, 47 L.Ed. 539 (1903), title to land taken through "seizure" or through a taking in the nature of inverse condemnation does not pass to the condemning agency until payment of just compensation. The condemning agency must choose: exercise of its eminent domain powers through payment of just compensation or face ejectment. *United States v. Lee, supra.* As the Ninth Circuit has recognized in this case, 590 F.2d 765, 767 (1979), (R. App. A), any action to recover just compensation for taking in the nature of inverse condemnation must be brought in federal court pursuant to *Minnesota v. United*

States, 305 U.S. 382 (1939) since the United States is an indispensable party. This axiomatic jurisdictional prerequisite has nothing to do with the form of the proceedings: formal, judicial eminent domain proceedings before entry upon the land, as opposed to proceedings to determine just compensation in case of the taking in the nature of inverse condemnation.

Congress in enacting 25 U.S.C. § 357 merely consented to condemnation of Indian lands in severalty "in the same manner as land owned in fee may be condemned . . ." under applicable state law. Neither that statute nor any other federal statute or rule of civil procedure, specifies the procedure which must be followed in condemning such land other than the fundamental jurisdictional requirement that the adjudicative stages of the proceeding must be in federal courts since the United States is an indispensible defendant or, in the case of the taking in the nature inverse condemnation, an indispensible plaintiff. While the judicial proceedings must be in federal court, the authority for manner of and procedure employed in the taking are governed by state—not federal law. In this respect, by using the language "may be condemned in the same manner as lands owned in fee may be condemned . . ." § 357 is both a substantive and procedural statute.

Under no circumstance, however, could a state or municipality acquire title to allotment lands through a taking in the nature of inverse condemnation, without payment of just compensation as determined by adjudication in the federal court, to which the United States was a party. Nor is there merit in the argument that "a taking by seizure offers the property owner no opportunity to challenge the authority for the taking or the extent of its necessity" (Pet. Brief 13). The Alaska Supreme Court in *State Department of Highways v. Crosby,* 410 P.2d 724, 729 (Alaska 1966) has held that such issues can be adjudicated in an inverse condemnation action. Indeed, the course of the present litigation indicates that these issues may be adjudicated without filing a separate eminent domain proceeding (Statement, Facts Par. 4, 8, 9). The United States has conceded that the Municipality has the necessary authority to condemn that portion of the Tabbytite allotment

necessary for the road (App: 41). The undisputed testimony at trial by all expert witnesses, Jack M. Spake, Rodney Spendlove and William Wakeland, is that the road is situated in the most practical location in which such a road could be situated. (Statement, Facts Par. 9)

That these factual issues have been adjudicated in this action already, (Statement, Facts Par. 8 and 9) belies this United States argument, as well as that of Tabbytite (Brief Pgs. 32-37).

Construing 25 U.S.C.A. § 357 to allow a taking in the nature of inverse condemnation would not deprive the allottee of just compensation through running of a statute of limitation, as is argued on page 17 of the United States Brief. Footnote 9 states:

> It is not clear whether under Section 357 state statutes of limitation govern or the federal statute (28 U.S.C. 2415) is applicable. That issue, however, is not involved here.

It is difficult to see how this program could arise. The United States as trustee has a moral and legal obligation to protect the interests of Indian allottees. *Minnesota v. United States,* 305 U.S. 382 (1939). *See* also *Board of County Commissioners v. Seber,* 318 U.S. 705, 715 (1943) (Pet. Brief, 23). In its capacity as trustee, with such moral and legal obligation, the United States would be an indispensable party plaintiff in any action to recover just compensation for a taking in the nature of inverse condemnation. Moreover, a state or municipality could never acquire title to Indian allotment lands without paying just compensation. If it refused to exercise its eminent domain powers through failure to pay just compensation, it should suffer ejectment. *United States v. Lee,* 106 U.S. 196 (1882); *United States v. Lynah,* 188 U.S. 445 (1903). 28 U.S.C. 2415(C) provides:

> Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, all right of possession of, real or personal property.

Since allotment lands are held in fee simple by the United States subject to the trust period for the Indian allottee, the statute of limitation cannot run for ejectment during the trust period if the state or municipality refuses to pay just compensation. It must choose: pay just compensation, valued at the date upon which the allottee was deprived of beneficial use of the property in question, or leave. If such just compensation is not made, 28 U.S.C. § 2415(C) specifically allows the United States to recover possession of the property regardless of the time which may have lapsed after the original entry.

The United States, on pages 18-19 of its brief, raises an interesting statute of limitations problem concerning a situation in which:

> a governmental taking is "piggy-backed" unto a trespass, either by a private person or by a entity lacking authority to effect a taking, an action for trespass can be asserted as a counterclaim in a condemnation proceeding no matter when the trespass occurred (25 U.S.C. § 2415(F). However, if takings by seizure are permitted, the burden of bringing a proceeding is on the United States and the Indian allottee, and any trespass claim must be asserted affirmatively. In such circumstances, the claim presumably would be subject to the sixth and one-quarter year statute of limitations set forth in 28 U.S.C. § 2415(B).

This may be true. Doubtless Congress, when it enacted that statute of limitations in 1966, was aware of the problem and was willing to entrust this duty of diligence to the United States in discharge of its fiduciary duties as trustee for the allottee. The duty imposed upon either the United States or the Indian is no greater than that which any other property owner must bear in being observant about trespass and seeking timely remedy—except that the statute of limitations for recovery of the land cannot run against the United States.

Under any circumstance, it is difficult to see how a procedural limitation of remedy, such as statute of limitation, enacted by a Congress sixty-five years after the fact has the slightest bearing upon interpretation of whether Congress in

1901 in enacting the word "condemned" in 25 U.S.C. § 357, intended to allow a taking in the nature of inverse condemnation where the laws of the state in question allowed this.

Finally, it is argued that permitting takings in the nature of inverse condemnation would impose a burden upon both the United States and allottees as a consequence of the Eleventh Amendment. (It is conceded on page 19 of the United States Brief that this problem does not occur if the condemnor is a municipality, as it is in this case, rather than a state). It is improbable that this consideration would have persuaded Congress in enacting 25 U.S.C. § 357 in 1901 to preclude a taking in the nature of inverse condemnation by its use of the word "condemned." The Dawes Allotment Act, Act of February 8, 1887, 24 Stat., 388, 389, § 4 (R. App. K) contemplated *settlement* upon the land by the allottees on land outside reservations, thereby making it improbable that allottees would be considered citizens of a different state. Under any circumstance, the burden upon the United States in discharge of its fiduciary duties as trustee for the allottee would be the same regardless whether the action were in formal, judicial eminent domain proceedings or through a taking in the nature of inverse condemnation.

Regardless of the nature of the proceeding, it must be brought in federal court and the United States must be an indispensable party, whether plaintiff or defendant. *Minnesota v. United States,* 305 U.S. 382 (1939). As the United States has conceded, on page 23 of its brief:

> The United States as trustee has a moral and legal obligation to protect the interests of Indian allottees.

Minnesota v. United States, supra, See also *Board of County Commissioners v. Seber,* 318 U.S. 705, 715 (1943).

As trustee it must discharge the same fiduciary duty, with the same preparation and diligence, regardless of whether its ward can bring suit. Hence, it is difficult to see how the Eleventh Amendment could place a higher fiduciary duty upon a trustee than that which Congress has already bestowed.

THE ALLEGED BURDENS WHICH WOULD BE IMPOSED BY ALLOWING 25 U.S.C. § 357 TO AUTHORIZE TAKINGS IN THE NATURE OF INVERSE CONDEMNATION, ARE PREDICATED UPON MATTERS NOT OF RECORD.

In setting forth its chain of "burdens" on pages 20-22 of the brief, the United States places extensive reliance upon matters not of record; matters which have never been introduced as any form of evidence in this case. Representative are the following assertions:

1. Indians do not reside on or make use of allotted lands.

2. Allotments are often quite remote.

3. Signs of encroachment are not always obvious. Boundaries are undertain.

4. Indians must overcome cultural barriers which inhibit their ability to comprehend Anglo-American concepts of property and vagaries of our legal system.

5. Unavailability of counsel.

6. Assertion that states or their political subdivisions condemn land "in remote areas."

7. The implication that land values are customarily rising.

8. The assertion that "Mrs. Tabbytite's award would be "prior to the current pipeline-induced land boom."

9. The United States holds an estimated 12 million acres of allotted land in trust. (Petition for Certiorari p. 9, n. 5.)

Argument which is not based upon evidence in the record, should be disregarded. Particularly objectionable are assertions, without evidence, concerning location of Indian allotments and assertions that the allottees have no immediate means to determine whether there has been an intrusion upon the land or not. Equally objectionable are the assertions which assume that land values always rise. Contrary arguments are set forth in *City of Anchorage v. Nesbett*, 530 P.2d 1324, 1334-36 (Alaska 1975); *State v. Stumbo*, 352 P.2d 478 (Ore.

1960); and *Georgia-Pacific Corporation v. United States*, 568 F.2d 1316 (Ct. Cl. 1978). An Indian allottee during the trust period could not lose her land by what amounts to adverse possession. During the trust period, the United States holds fee title to the allotment as trustee. 24 U.S.C. § 2415(C) removes any barrier which might be imposed by a statute of limitation for recovery of the property. Title could not pass to a condemning agency, through the process of a taking in the nature of inverse condemnation, without payment of just compensation. *United States v. Lee*, 106 U.S. 196 (1882); *United States v. Lynah*, 188 U.S. 445 (1903).

RESPONSE TO BRIEF OF BERTHA MAY TABBYTITE

HIGHWAY RIGHTS-OF-WAY ACROSS ALOTTED INDIAN LANDS ARE SUBJECT TO CONDEMNATION.

25 U.S.C. § 311 is not the exclusive grant of authority for acquisition of the highway right-of-way across Indian allotment lands.

Tabbytite argues that 25 U.S.C. § 311 is the exclusive provision allowing acquisition of rights-of-way across Indian allotment lands, to the exclusion of § 357. In support of its argument it asserts that it governs, as a more specific statute, although both sections were enacted as consecutive parts of the same bill, on the same day, by the same Congress. Paragraph 25 U.S.C. § 311 provides:

> The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to an individual Indian under any laws or treaties, but which have not been conveyed to the allottee with full power of alienation.

25 U.S.C. § 357 reads:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

It is argued that because § 311 allows the Secretary to grant permission for "the opening and establishment of public highways, . . ." whereas § 357 allows allotment lands to be "condemned for any public purpose under the laws of the State or Territory where located . . .", the former should control over the latter as being more specific and dealing with identical subject matter (Tabbytite Brief: 9-14).

The two statutes do not deal with identical, or even similar subject matter. Section 311 authorizes the Secretary of the Interior to "grant permission" to state and local authorities across allotment lands under such requirements as he may deem necessary. This connotes a consensual grant, a negotiated purchase by the state or territory, as it were, from the Secretary. Section 357 authorizes "condemnation." The difference between a negotiated purchase and condemnation is that between apples and oranges.

A negotiated purchase is consensual in nature on behalf of each party. If permission is to be granted under § 311, it must be by permission of the Secretary, under such terms and conditions as he may choose. Condemnation, exercise of the power of eminent domain, is far different. It is defined in 1 *Nichols on Eminent Domain* § 1.11 (Rev. Third Ed. 1976) as follows:

> Eminent domain is the power of the sovereign to take property for public use without the owners consent. This definition expresses the meaning of the power in its irreducable terms:
>
> (a) Power to take,
>
> (b) Without the owners consent,
>
> (c) For the public use.

Nichols further explains the power of condemnation, of eminent domain:

> It is an inherent power, necessary to the very existence of the government. It comes into being *eo instante* with the establishment of the government and continues as long as the government endures. It does not require recognition by constitutional provision but exists in absolute and unlimited form. Under this view, positive assertion of limitations upon the power is required. This requirement is met by the provisions found in most of the state constitutions relating to the taking of power by eminent do-

> main. Such constitutional provisions neither directly nor impliedly grant the power to eminent domain, but are simply limitations upon a power already in existence which would otherwise be unlimited. (*Id.* § 114 [2]).

Morton v. Mancari, 417 U.S. 535, 550, 41 L.Ed. 2d 290, 300 (1974) recognized that the rule that a more specific statute governs over a more general is not applicable when the statutes deal with entirely different subjects. In this respect, the difference between § 311 and § 357 is not unlike the preferential Indian employment provisions in the Bureau of Indian Affairs set forth by the Indian Reorganization Act of 1934 and its apparent conflict with the Equal Employment Opportunity Act of 1972. In distinguishing the two and rejecting the "more specific statute" argument, this Court observed:

> The anti-discrimination provisions aimed at alleviating minority discrimination in employment, is obviously designed to deal with an entirely different and, indeed, opposite problem. Any perceived conflict is more apparent than real. (U.S. at 550, L.Ed. 2d at 300).

The same is true of 25 U.S.C. § 311 and § 357.

Without exception, the circuit courts have and, upon at least one occasion this Court, has recognized that § 311 and § 357 are *alternative* remedies for acquisition of rights-of-way by a state or its political subdivision. *United States v. Minnesota,* 113 F.2d 770, 773 (8th Cir. 1940); *Nicodemus v. Washington Power Company,* 264 F.2d 614 (9th Cir. 1959); *City of Okemah, Oklahoma v. United States,* 140 F.2d 963, 966 (10th Cir. 1944); *United States v. Oklahoma Gas and Electric Company,* 127 F.2d 349, 354-55 (1942), *aff'd* 318 U.S. 206, 214 (1943); *Transok Pipeline Company v. Darks,* 565 F.2d 1150, 1153 (10th Cir. 1977), *cert. denied* 435 U.S. 1006 (1978).

Indeed, if § 311 were construed to exclude the right of states or their political subdivisions to condemn allotment lands for highway purposes, if the laws of the state so allowed, yet another canon of statutory interpretation would be violated. An important public purpose authorized by §357 could no longer be achieved through the power of eminent domain,

rather than negotiated purchase. *United States v. Campos-Serrano,* 404 U.S. 293, 301, n. 14, 30 L.Ed. 2d 457, 464 (1971) holds that:

> [A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant.

Conversely, construing § 357 to allow condemnation of highway rights-of-way, as well as all other public purposes, would not deprive the right of the Secretary to grant permission under terms of his choosing for highways where the state or political subdivision desired a negotiated, administrative purchase and did not wish to enter into the judicial thicket of eminent domain. Construing the statutes as alternative remedies, as this Court and all circuits which have adjudicated the issue have done, gives effect to both § 311 and § 357. As this court observed in *Morton v. Mancari,* 417 U.S. 535, 551, 41 L.Ed. 2d 290, 301 (1974):

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

As all parties have observed, there is no significant legislative history which illustrates congressional intention governing enactment of either § 311 or § 357.

PRIOR ADMINISTRATIVE PRACTICE AND CONSTRUCTION ARE NOT OF MUCH ASSISTANCE.

The Municipality concurs with Tabbytite that prior administrative practice and construction are not of much assistance.

UNITED STATES V. OKLAHOMA GAS AND ELECTRIC COMPANY, 127 F.2d 349, 354-355 (1942) aff'd 318 U.S. 206, 214 (1943) DOES NOT SUPPORT THE INAPPLICABILITY OF § 357 TO THE ACQUISITION OF HIGHWAY RIGHTS-OF-WAY.

Tabbytite's analysis that *United States v. Oklahoma Gas and Electric Company,* 318 U.S. 206 (1943) precludes use of § 357 to acquire highway rights-of-way is baffling. Not only did this Court affirm a judgment by the Tenth Circuit, 127 F.2d 349, 354-355 (1942) which expressly acknowledged that § 357 and § 311 were alternative remedies to acquisition of highways across allotment lands; it further recognized that exercise of § 357 was not contingent upon permission of the Secretary of the Interior. It acknowledged that the power of condemnation of allotment lands pursuant to § 357 was an independent grant of powers to the states to condemn Indian allotment land which was an alternative to other right-of-way statutes, including § 311. 318 U.S. 206, 214 (1943). The compatibility of § 311 and § 357 as alternative remedies has been affirmed by every court to pass upon the issue. *United States v. Minnesota,* 113 F.2d 770, 773 (8th Cir. 1940); *Nicodemus v. Washington Power Company,* 264 F.2d 614 (9th Cir. 1959); *City of Okemah, Oklahoma v. United States,* 140 F.2d 963, 966 (10th Cir. 1944); *Transok Pipeline v. Darks,* 565 F.2d 1150 (10th Cir. 1977) *cert. denied* 435 U.S. 1006 (1978).

THE ACT OF FEBRUARY 5, 1948 DOES NOT PRECLUDE CONDEMNATION THROUGH § 357.

General

The Municipality concurs with Tabbytite's assertion, occurring on pages 20-24 of her brief, that if the act of February 5, 1948, 25 U.S.C. § 323-328 were intended to repeal § 357, by either statutory interpretation or implied repeal, lack of one Indian allottee's consent would preclude acquisition of any part of allotment lands for any public purpose if the allotment were in single ownership. 25 U.S.C. § 324 allows a grant of

right-of-way across the lands of individual Indians without consent of the individual owners only if:

1. the land is owned by more than one person, and the owner or owners of the majority of the interest therein consent to the grant;

2. the whereabouts of the owner of the land or interest therein are unknown, and the owner or owners of any interest therein whose whereabouts are known, or a majority thereof consent to the grant;

3. the heirs or devisees of a deceased owner of the land or an interest therein have not been determined and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or

4. the owners of interests in the land are so numerous that the Secretary finds that it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

Clearly, if allotment lands are in the hands of a single owner, the Secretary would be powerless to grant a right-of-way without that owner's permission. The entire purpose of condemnation of a portion of allotment lands pursuant to the laws of the state would be thwarted because, by definition, exercise of the power of eminent domain is without the consent of the owner. 1 *Nichols on Eminent Domain* § 1.11 (3rd Rev. Ed. 1976). The fundamental question is whether Congress intended such an extreme abrogation of the states' necessary powers of eminent domain. If so, any project of a state or municipality which must utilize individual allotment lands could be thwarted by one recalcitrant Indian if the land were in single ownership.

Canons of statutory interpretation do not compel such a result.

The secretarial grant provisions of §§ 323-328 are in the nature of negotiated purchase of right-of-way, a consensual transaction. The "condemnation" provisions of § 357, by

definition, allow exercise of the sovereign of eminent domain contrary to the wishes of all owners in property.

Tabbytite notes that §§ 311 and 323-328 specifically apply only to rights-of-way while § 357 authorizes condemnation generally for any public purpose. Brief for Tabbytite goes on to argue that the Court can give effect to both §§ 323 et seq. and § 357 with regard to the acquisition of interest in allotted lands other than rights-of-way. (Tabbytite at 22.) The Court should observe, however, that the specificity of §§ 311-322 and §§ 323-328 relate to the power of Secretary of the Interior to *grant* rights-of-way according to various rules and conditions. Neither the cases cited nor the rules of statutory construction diminish the efficacy of § 357 as a separate means of acquiring rights-of-way across allotted lands by one other than the Secretary. The court can therefore give effect to both §§ 323-328 and § 357 by giving effect to the plain meaning of §§ 323-328 granting certain powers to the Secretary that are in no way limiting, inconsistent with, or repugnant to the provisions of § 357 allowing condemnation by means other than the exercise of powers by the Secretary.

Nor does the rule of statutory construction known as *expressio unis exclusio alterius* apply. The 1948 amendments dealt purely with secretarial grants of right-of-way. The condemnation provisions of § 357 dealt with an entirely different subject matter. These are alternative, compatible ways of acquiring rights-of-way across allotment lands.

Although the expressio unis maxim has been applied as a part of legal reasoning, there is nothing particularly legal about it; it is a product of logic and common sense expressing the idea that generally when a statute says one thing it does not mean something else. 2A Sutherland, *Statutes and Statutory Construction* § 47.24, at 127 (4th ed. 1973). The maxim has been applied in many cases defining the limits of the doctrine of implied repeal. In one such case the Colorado Supreme Court stated that the maxim:

> The maxim may never be resorted to in denial of existing rights by envoking its aid in the interpretation of a statute granting others which are not inconsistent. . . .

People ex rel Park Reservoir Co. v. Hinderlider, 57 P.2d 894, 897 (Colo. 1936). The maxim is only a rule of statutory construction, not a rule of substantive law, that must be applied with great caution and only under certain conditions where it is appropriate. 2A Sutherland, *Statutes and Statutory Construction* § 47.25, at 132 (4th ed. 1973).

Because § 357 was enacted in 1901 and §§ 323-238 were enacted in 1948, a period of some 47 years, Judge Magruder's statement in *Rios v. United States* is particularly appropriate:

> As bearing on the intention of Congress it is worthwhile to note: (1) that the maxim expressio unis est exclusio alterius is nothing but an aid to interpretation, and as an aid it is pretty weak when applied to acts of Congress enacted at widely separated times.

Rios v. United States, 256 F.2d 68, 71 (1st Cir. 1958).

Neither logic nor even legal reasoning require the conclusion that a mere grant of powers to the Secretary of Interior pursuant to §§ 323-28 is inconsistent with, repugnant to, or irreconcilable with a prior statute allowing the acquisition of right of ways over allotted lands.

Although the *expressio unis* maxim has been applied as a part of legal reasoning, there is nothing particularly legal about it; it is a product of logic and common sense expressing the idea that generally when a statute says one thing it does not mean something else. 2A Sutherland, *Statutes and Statutory Construction* § 47.24, at 127 (4th ed. 1973). The maxim has been applied in many cases defining the limits of the doctrine of implied repeal. In one such case the Colorado Supreme Court stated that the maxim:

> The maxim may never be resorted to in denial of existing rights by envoking its aid in the interpretation of a statute granting others which are not inconsistent. . . .

People ex rel Park Reservoir Co. v. Hinderlider, 57 P.2d 894, 897 (Colo. 1936). The maxim is only a rule of statutory construction, not a rule of substantive law, that must be applied

with great caution and only under certain conditions where it is appropriate. 2A Sutherland, *Statutes and Statutory Construction* § 47.25, at 132 (4th ed. 1973).

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The Act of February 5, 1948
Did Not Repeal § 357 by Implication.

This court, in *Morton v. Mancari,* 417 U.S. 535, 550, 551 (1974) set forth the standard by which an allegation of repeal by implication must be judged:

> In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. . . . (Citations omitted). . . .
>
> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts on the same subject, the rule is to give effect to both

> if possible. . . . The intention of the legislature to repeal "must be clear and manifest."

Nothing in the legislative history of the Act of February 5, 1948 suggests an intention to preclude, or even restrict, existing powers of condemnation of Indian allotment lands contained in § 357.

Legislative history of the Act of February 5, 1948, 25 U.S.C.A. §§ 323-328, 62 Stat. 17, is found in *United States Code and Congressional Service,* 1033-1037 (1948). R. App. H It began its life as Senate Bill 1095, introduced on April 11, 1947 which was intended "To Facilitate Rights-of-way Through Restricted Osage Indian Land and for Other Purposes" (*Id.* 1034). A companion bill, H.R. 3322 was introduced on July 7, 1947. It read:

> That the Secretary of the Interior is hereby authorized to grant rights-of-way in the nature of easements, under such rules and regulations as he may prescribe, for the construction, operation and maintenance of pipelines of every kind and character, pumping plants, canals, ditches, flumes, highways, telephone and telegraph lines, and electric power transmission lines, over, under, upon, through, and across any lands, the title to which is inalienable without approval of the Secretary of the Interior, owned or acquired or by or for any member of the Osage tribe who does not have a certificate of competency.

Volume 93, Congressional Record, 8354.

A substitute bill, recommended by the Secretary of the Interior, was enacted in place of the former language of H.R. 3322. *United States Code and Congressional Service,* 1033-1034 (1948). The most comprehensive statement of legislative purpose adopted by the Senate Committee on Public Lands, through Senate Report No. 823 was a letter from the Secretary of Interior to the President of the Senate, dated July 22, 1947 (*Id.* at 1036). As the Secretary explained, the purpose of expanding the scope of the act from only Osage lands to all Indian lands, owned individually or tribally, was to simplify the procedural impendments which had hindered the

Secretary from granting rights-of-way across Indian lands. Its principal intention was *not* to add additional layers of protection to Indian rights. It was to save the United States time and money by streamlining Secretarial grant procedures.

Procurring the consent of Indians with individual interests in an allotment posed a particularly onerous administrative duty upon the Secretary. He explained:

> When it is discovered that an application for a right-of-way may not be granted under existing statutory authority, which is often the case, the right must then be obtained by means of easement deeds executed by the Indian owners and approved by the Secretary of the Interior. Very often as many as 15 to 20 individual Indians own undivided interests in 1 parcel of land and the signatures of all owners must be obtained. As a general rule these owners are widely scattered and frequently one or more of them are deceased and their heirs have not been determined. Thus, years may elapse before all of the owners' signatures can be obtained. As a practical matter, the burden of obtaining signatures to easement deeds falls on this department and becomes a time- and money-consuming operation. In a great many cases the value and amount of land required for a right-of-way is very little and the cost to the United States in time and money is very high.

In the interest of departmental economy, the Secretary proposed the present text of 25 U.S.C. §§ 323-328, the Act of 1948. Instead of expanding the right of any Indians with an interest in an allotment oppose a Secretarial grant, the Secretary would make this decision for him—of course within the limits set forth Section 2 of the proposed bill, now 25 U.S.C. § 324.

Considering the language of the July 22, 1947 letter, which Senate Report 823 suggests, is persuasive authority of the intent of the bill, it is questionable whether the "consent" provisions of the Act of 1948 were intended to expand any rights of

Indians to object to Secretarial right-of-way grants across their allotments. Rather, it suggests that the purpose behind the Act was to *restrict* their right of objection in the interest of departmental economy.

There is nothing in the letter to indicate restriction of the powers of the Secretary. Nor was there the slightest evidence that Congress, in enacting the act of February 5, 1948 intended to repeal, or even curtail the condemnation powers bestowed by § 357. The only reference to "condemnation" in the letter of July 22, 1947 is the last paragraph:

> Section 5 of the Bill *broadens* existing powers of condemnation over individually owned Indian lands. [Emphasis added.]

Tabbytite argues, on page 24 note 14 of the brief, that "Interior may have used the term 'condemnation' loosely to refer to procedures authorizing administrative conveyance of rights-of-way across Indian lands." 25 U.S.C. § 327, Section 5 of the Act, does apparently broaden Secretarial powers to grant rights-of-way to federal agencies. However, it is equally probable that when the Secretary used the word "condemnation," he meant just what he said: "condemnation," not "negotiated purchase" or "Secretarial grant." The terms are different by definition. In any instance, there is no legislative history which suggests an affirmative intention to repeal § 357.

In arguing repeal by implication, Tabbytite relies on *Plains Electric Generation and Transmission Cooperative, Inc. v. Pueblo of Laguna,* 542 F.2d 1375 (10th Cir. 1976). There, the act of May 10, 1926, 44 Stat. 498, which allowed condemnation of the lands of the Pueblo Indians in New Mexico, was repealed by implication by the act of April 21, 1928, 45 Stat. 442, currently 25 U.S.C. § 322, and, by way of dictum, by the act of February 5, 1948. The test for repeal by implication was:

> There are two-well settled categories of repeals by implication:
>
> 1. Where provisions in the two acts are in irreconcilable conflict, the latter act to the extent of the conflict con-

stitutes an implied repeal of the earlier one; and

2. If the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act (at 1376).

The court held that the 1928 act was clearly intended to operate as a substitute (1377, 1378) and was so inconsistent with the 1926 act that it, alone, was held to repeal that act (1379).

The court also ruled, by way of dictum, that the 1926 act was also repugnant to the act of February 5, 1948. However, it acknowledged that:

> Although the 1948 act may be considered as an independent basis of repeal by implication, it may also be considered as accumulative to the 1928 act. As will be discussed later, the two form may comprehensive scheme. We believe there is a positive repugnancy between the 1948 act and the 1926 act, but this does not negate the probability that Congress considered the 1926 act already repealed (1379).

This is not persuasive authority for assertion that the 1948 Act repealed § 357 by implication. It dealt with condemnation of tribal, not individual allotment lands. Neither § 311 or § 357 were mentioned in the case. It was limited to a unique statute, dealing with a unique tribal institution, Pueblo lands (1377), the only lands of any tribe subject to condemnation. The case was rendered moot by the congressional enactment of what are now 25 U.S.C. § 322 and § 322A nearly a month before the decision was announced. In 25 U.S.C. § 322 the continued viability of § 3 and § 4 of the act of March 3, 1901, which contains both § 311 and § 357 was expressly recognized.

Significantly, a year after the case was decided, the same court for the Tenth Circuit, in *Transok Pipeline Company v. Darks*, 565 F.2d 1150, 1153 (10th Cir. 1977) ruled that § 311 and § 357 were valid, independent, alternative powers for acquisition of rights-of-way, acknowledging that § 357 does not require consent of the Secretary of the Interior. This court

declined to review this holding through a writ of certiorari 435 U.S. 1006 (1978).

In considering whether there was an implied repeal of the condemnation provisions of § 357, including destruction of all potential causes of action in the nature of inverse condemnation for Indian allottees, the 1948 act should be construed in light of its impact upon the Indian. However, finding a repeal by implication could seriously prejudice Indian allottees (see the discussion on *Albers v. California,* 398 P.2d 129 (Cal. 1965) on pages 23-27, *supra.*

THIS COURT SHOULD NOT CONSIDER POINTS RAISED FOR THE FIRST TIME ON APPEAL.

Neither of the argument that § 311 controls, to the exclusion of § 357, nor the argument that § 357 was repealed by implication by the 1948 act was raised before either the District Court or the Ninth Circuit Court of Appeals. Normally, issues not raised before the Court of Appeals should not be considered by this court. *Neely v. Eby Construction Company,* 386 U.S. 317, 330 (1967).

The issues in *Plains Electric Generation and Transmission Cooperative, Inc. v. Pueblo Lagona,* 542 F.2d 1375 (10th Cir. 1976) concerning whether the 1926 act dealing with Pueblo lands was viable had been resolved by the Congress, through enactment of 25 U.S.C. § 322, 322A a month before the court issued its decision. Since that issue is moot, it should not trouble this Court in the future.

Similarly, the issue whether § 311 controls to the exclusion of § 357 should not be considered by this court since it was not presented to the Ninth Circuit. There is no conflict of circuit court decisions concerning whether § 311 and § 357 are valid, independent, alternate remedies for acquiring rights-of-way. *United States v. Minnesota,* 113 F.2d 770, 773 (8th Cir. 1940); *Nicodemus v. Washington Power Company,* 264 F.2d 614 (9th Cir. 1959); *City of Okemah, Oklahoma v. United States,* 140 F.2d 963, 966 (10th Cir. 1944); *United States v. Oklahoma Gas and Electric Company,* 127 F.2d 349, 354-355 (1942), *aff'd* 318

U.S. 206, 214 (1943); *Transok Pipeline Company v. Darks*, 565 F.2d 1150, 1153 (10th Cir. 1977), *cert. denied* 435 U.S. 1006 (1978).

TAKING PRIVATE PROPERTY THROUGH INVERSE CONDEMNATION IS NEITHER UNCONSTITUTIONAL NOR UNFAIR, PARTICULARLY UNDER THE PRESENT CIRCUMSTANCES.

Tabbytite's Brief states, on pages 30-31 that:

> It is undisputed that the United States and Tabbytite were not notified of any alleged taking when Anchorage took over control and maintenance of the road. On its face, this constitutes a blatant violation of the procedural due process that is guaranteed by the Fifth and Fourteenth Amendments . . . in the circumstances presented here a taking of property by seizure would be unconstitutional.

It continues, on page 34, note 21:

> While Anchorage's predecessors had claimed that they enjoyed an easement of necessity across Tabbytite's allotment, that issue had been resolved in favor of Tabbytite and the United States prior to Anchorage's first appearance in this case. See Brief in Opposition to Certiorari at 3-4.

The Brief continues:

> There is no conceivable excuse for the failure or refusal to provide notice and a opportunity to be heard under these circumstances. (34)

These statements approach innuendo.

It is probably true that after Anchorage began maintenance of the road as a consequence of unification in September, 1975 and through the winter months which preceded the Ninth Circuit's decision in February 1976, no notice was given to Tabbytite that the road was being maintained as a Municipal street. There was neither moral nor legal reason to do so. Anchorage had succeeded to all interests and liabilities of Glen

Alps upon unification. Between that date and February, 1976 when the Ninth Circuit ruled, it *was* the prevailing party in litigation which had lasted for over six years. Between August 24, 1972 and February, 1976, pursuant to the Memorandum and Order of August 24, 1972 and that of October 3, 1973, that an easement of necessity existed across the Tabbytite land, (Pet. App. F), the City of Glen Alps, and thereafter the Municipality, maintained the road as a matter of right. It is not customary for a prevailing party in long-standing litigation, acting under court order, to repeatedly notify the losing party that it is exercising the rights ordered by the court and that the losing party should come forth and be heard again.

Tabbytite has been an active, participating party, as Intervenor in this action since June, 1972. She has been represented by counsel. She participated actively in the three-day trial on the merits in June, 1972 and, while represented by counsel, had every opportunity for cross-examination. Maintaining a road through the rigors of an Alaskan winter pursuant to a final judgment of the United States District Court, a decision which had not yet been overturned, is hardly high-handed behavior which "constitutes a blatant violation of the procedural due process that is guaranteed by the Fifth and Fourteenth Amendments." Similarly, failure to notify the losing party to litigation over a road that the road is being maintained pursuant to court order hardly constitutes basis for the allegation that "[T]here is no conceivable excuse for the failure or refusal to provide notice and an opportunity to be heard under these circumstances."

After the Ninth Circuit rendered its decision in February, 1976, the Municipality promptly entered an appearance. (Statement, Facts, Pars. 5, 7). Promptly after the file was returned to Anchorage from San Francisco so that the basis of the litigation could be examined by the new party, good faith litigation was begun to determine whether the road had been taken through inverse condemnation. (R:11-12; 13-40; 48-65). Tabbytite, as an Intervenor, was a party to this litigation. She has not alleged that she did not receive every pleading, motion or memorandum that was served upon every other party.

Therefore it is difficult to understand the allegation that "in the circumstances presented here a taking of property by seizure would be unconstitutional."

As a matter of law, failure to provide notice prior to a taking in the nature of inverse condemnation has never been held by this Court to constitute a constitutional infirmity. As this Court indicated in *Hurley v. Kincaid*, 285 U.S. 95, 104-105, 76 L.Ed. 637, 643 (1932), when the United States threatened to overflow a plaintiff's land the Court said:

> For even if the defendants are acting illegally, under the act, and threatening to proceed without first obtaining flowage rights over the complainant's lands, the only illegality, on complainant's own contention, is confined to the failure to compensate him for the taking and afford no basis for an injunction if such compensation may be procured in an action at law. The Fifth Amendment does not entitle him to be paid in advance of the taking. [Citations omitted.]

Lack of prior notice and opportunity to be heard did not affect the takings in inverse condemenation in *United States v. Causby,* 328 U.S. 256, 90 L.Ed. 1206 (1946); *Griggs v. Allegany County,* 369 U.S. 84, 7 L.Ed. 585 (1962) or *Myers v. United States,* 323 F.2d 580, 582-583 (9th Cir. 1963).

Nor has the Alaska Supreme Court required prior notice and opportunity to be heard before a taking in inverse condemnation may occur.*State Department of Highways v. Crosby,* 410 P.2d 724, 728-729 (Alaska 1966); *City of Anchorage v. Nesbett,* 530 P.2d 1324 (Alaska 1975); *Wickwire v. City and Borough of Juneau,* 557 P.2d 783 (Alaska 1976); *Grant v. State of Alaska,* 560 P.2d 36 (1977), regardless of the procedural statutes of Alaska eminent domain law set forth on pages 35-36 of the Tabbytite Brief or those set forth in its App. B.

Schroeder v. City of New York, 31 U.S. 208 (1962) and *Walker v. City of Hutchinson,* 352 U.S. 112 (1956) require prior notice by the best practicable means to the property owners only to give them an opportunity to participate in adjudication of just compensation. Neither dealt with a fact situation reminiscent of inverse condemnation.

Bridges v. Alaska Housing Authority, 349 P.2d 149 (Alaska 1959), has no relevance to a case in the nature of inverse condemnation. It dealt with the authority of the Alaska Housing Authority to exercise a declaration of taking. The Alaska Supreme Court recognized that the declaration of taking is not a mere procedural tool in eminent domain; it is a distinct, substantive right, sparingly given by the legislature. Like the Federal Declaration of Taking Act, after which it was patterned, it is an extraordinary remedy on the part of the condemnor. (See *Arco Pipeline Company v. Stewart,* 539 P.2d 64. (Alaska 1975)). For this reason, these cases discussed on pages 35-36 of the Tabbytite brief, which rely upon a declaration of taking, have no relevance whatsoever to a taking in the nature of inverse condemnation.

In short, Tabbytite has been accorded due process. The United States has acknowledged the authority of the Municipality to condemn the road in question (App: 41). A three-day trial on the merits, in which Tabbytite was both represented by counsel and was an active participant with every opportunity to cross-examine, elicited uncontradicted expert testimony that the road, as now situated, is placed in a position which is practical and suitable to both public and private need. (Statement, Facts, Par. 9). The Municipality has both maintained the road and engaged in this litigation in good faith and has stipulated since 1976 that the issue of just compensation could be adjudicated in the Federal District Court in this action at any time the United States and Tabbytite were willing to do so. (R:60; Statement, Issue of Law)

CONCLUSION

In 1901, when Congress enacted § 357, it intended to place allottees of Indian lands in severalty on an equal basis with every owner of land in fee simple in the state situated, under the eminent domain laws of that state. At the time the act was enacted, both widespread federal and state practice acknowledged a cause of action in eminent domain by which property could be taken for public purpose without prior filing of formal eminent domain proceedings, but with an implied contract that the owner must either be paid just compensation or the condemnor ejected; a taking sometimes known as seizure, and now known as inverse condemnation. Contemporaneous federal statutes between 1880 and 1916, using such words "condemn" and "condemned under judicial process" were construed by this Court, between 1883 and 1924 to authorize "condemnation" through seizure or, what is now known as inverse condemnation.

There is no reason to ignore the plain wording of § 357. The manner and procedure of the taking are to be determined by the state, not federal, law. If state law allows the taking in the nature of inverse condemnation, state law controls. If it does not, state law also controls.

Finally, as the Ninth Circuit Court of Appeals observed in this case in 590 F.2d 465, 765, 767 (1979), (R: App. A):

> To us it seems a contradiction to deny Indian beneficial owners a cause of action for damages under the guise of protecting their rights. Allowing condemnation suits will encourage states and political subdivisions to act with more circumspection not less, when governmental activities conflict with ownership rights of Indian trust lands.

To deny Indian allottees the same constitutional right to a cause of action in inverse condemnation which is available to other American citizens under the guise of protecting their rights would be a disservice to the class by denying them an almost boundless tool for preventing any state or municipal

government from imposing upon them a disproportionate share of the cost of any public improvement (see discussion concerning *Albers v. California,* 398 P.2d 129 (Cal. 1965), pages 23-27, *supra.*.

The decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Municipality of Anchorage, Alaska

December, 1979

APPENDIX C

Act of Congress approved *July 15, 1882, 22 Stat. at L. 168, entitled "An Act to Increase the Water Supply of the City of Washington,* and for Other Purposes." The Act provides for a survey and map of the land necessary to extend the Washington Aqueduct to the high ground north of Washington, near Sixth Street extended, and of the land necessary for a reservoir at that point. But it also contains the following provisions:

The Secretary of War shall cause to be made *** a like survey and map of the land necessary for a dam across the Potomac River at the Great Falls, including the land now occupied by the dam, and the land required for the extension of said dam across Conn's Island to and upon the Virginia shore; and when surveys and maps shall have been made, the Secretary of War and the Attorney-General of the United States shall proceed to acquire to and for the United States the outstanding title, if any, to said land and water rights, and to the land on which the gate house at Great Falls stands by condemnation: *** *And provided further,* That if it shall be necessary to resort to condemnation, the proceeding shall be as follows:

When the map and survey are completed, the Attorney-General shall proceed to ascertain the owners or claimants of the premises embraced in the survey, and shall cause to be published, for the space of thirty days, in one or more of the daily newspapers published in the District of Columbia, a description of the entire tract or tracts of land embraced in the survey, with a notice that the same has been taken for the uses mentioned in this Act, and notifying all claimants to any portion of said premises to file, within its period of publication, in the Department of Justice, a description of the tract or parcel claimed, and a statement of its value as estimated by the claimant. On application of the Attorney-General, the Chief Justice of the Supreme Court of the District of Columbia shall appoint three persons, not in the employ of the Government, or related to the claimants, to act as appraisers, whose duty it shall be, upon receiving from the Attorney-General a description of any tract or parcel the ownership of which is claimed

separately, to fairly and justly value the same and report such valuation to the Attorney-General, who thereupon shall, upon being satisfied as to the title to the same, cause to be offered to the owner or owners the amount fixed by the appraisers as the value thereof; and if the offer be accepted, then, upon the execution of a deed to the United States in form satisfactory to the Attorney-General, the Secretary of War shall pay the amount to such owner or owners from the appropriation made therefor in this Act.

In making the valuation the appraisers shall only consider the present value of the land without reference to its value for the uses for which it is taken under the provisions of this Act.

The appraisers shall each receive for their services five dollars for each day's actual service in making the said appraisements.

Any person or corporation having any estate or interest in any of the lands embraced in said survey and map, who shall for any reason not have been tendered payment therefor as above provided, or who shall have declined to accept the amount tendered therefor, and any person who, by reason of the taking of said land or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right, may, at any time within one year from the publication of notice by the Attorney-General as above provided, file a petition in the Court of Claims of the United States, setting forth his right or title and the amount claimed by him as damages for the property taken or injury sustained; and the said court shall hear and adjudicate such claims in the same manner as other claims against the United States are now by law directed to be heard and adjudicated therein; *Provided,* That the court shall make such special rules in respect to such cases as shall secure their hearing and adjudication with the least possible delay.

Judgments in favor of such claimants shall be paid as other judgments of said court are now directed to be paid; and any claimant to whom a tender shall have been made, as hereinbefore authorized, and who shall have declined to accept the

same, shall, unless he recover an amount greater than that so tendered, be taxed with the entire cost of the proceeding. All claims for value or damages on account of ownership of any interest in said premises, or on account of injury to a property right by the construction of said works, shall, unless a petition for the recovery thereof be filed within one year from the date of the first publication of notice by the Attorney-General as above directed, be forever barred; *Provided,* That owners or claimants laboring under any of the disabilities defined in the Statute of Limitations of the District of Columbia may file a petition at any time within one year from the removal of the disability.

Upon the publication of the notice as above directed, the Secretary of War may take possession of the premises embraced in the survey and map, and proceed with the constructions herein authorized; and, upon payment being made therefor, or, without payment, upon the expiration of the times above limited without the filing of a petition, an absolute title to the premises shall vest in the United States.

Sec. 2. That the Secretary of War be, and is hereby, authorized and directed to extend the Washington Aqueduct from its present eastern terminus to the high ground north of Washington near Sixth street extended; and that he construct at that point a reservoir of the capacity of not less than three hundred millions gallons, erect the necessary gatehouse, and lay such main-connections as may be necessary to furnish to Washington and Georgetown an ample supply of water; and that he complete the dam at Great Falls to the level of one hundred and forty-eight feet above tide, and extend the same at that level across Conn's Island to the Virginia shore; and that he raise the embankment between the Potomac River and the Chesapeake and Ohio Canal above the dam, so as to protect the canal from the increased flooding which the completion of the dam will cause in times of high water, or to pay to the canal company, in full satisfaction for all such flooding, the amount hereinafter appropriated for that purpose.

Sec. 3. That the following sum or so much thereof as may be necessary are hereby appropriated out of any money in the treasury not otherwise appropriated:***

To pay for water rights and land necessary to extend dam at Great Falls to the Virginia shore, forty-five thousand dollars.

For work and material to complete the dam at Great Falls to the level of one hundred and forty-eight feet above tide, and extend the same to the Virginia shore, one hundred and forty-five thousand one hundred and fifty-one dollars.

To protect the Chesapeake and Ohio Canal from increased flooding by reason of completing the dam at Great Falls, twelve thousand three hundred dollars.

To provide for the erection of suitable fishways at the Great Falls of the Potomac, and at the dam to be constructed under the provisions of this Act, in accordance with plans and specifications to be prescribed by the United States Commissioner of Fish and Fisheries, fifty thousand dollars, or so much thereof as may be necessary.''

APPENDIX D

Chap. 1001—An act authorizing the establishing of a public park in the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a tract of land lying on both sides of Rock Creek, beginning at Klingle Ford Bridge, and running northwardly, following the course of said creek, of a width not less at any point than six hundred feet, nor more than twelve hundred feet, including the bed of the creek, of which not less than two hundred feet shall be on either side of said creek, south of Broad Branch road and Blagden Mill road and of such greater width north of said roads as the commissioners designated in this act may select, shall be secured, as hereinafter set out, and be perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States, to be known by the name of Rock Creek Park: *Provided, however,* That the whole tract so to be selected and *condemned* der the provisions of this act shall not exceed two thousand acres nor the total cost thereof exceed the amount of money herein appropriated.

Sec. 2. That the Chief of Engineers of the United States Army, the Engineer Commissioner of the District of Columbia, and three citizens to be appointed by the President, by and with the advice and consent of the Senate, be, and they are hereby, created a commission to select the land for said park, of the quantity and within the limits aforesaid, and to have the same surveyed by the assistant to the said Engineer Commissioner of the District of Columbia in charge of public highways, which said assistant shall also act as executive officer to the said commission.

Sec. 3. That the said commission shall cause to be made an accurate map of said Rock Creek Park, showing the location, quantity, and character of each parcel of private property to be taken for such purpose, with the names of the respective owners inscribed thereon, which map shall be filed and recorded in the public records of the District of Columbia, and from and after the date of filing said map the several tracts and parcels of land embraced in said Rock Creek Park shall be held as condemned for public uses, and the title thereof vested in the United States, subject to the payment of just compensation, to be determined by said commission, and approved by the President of the United States: Provided, That such compensation be accepted by the owner or owners of the several parcels of land.

That if the said commission shall be unable by agreement with the respective owners to purchase *all of the land so selected and condemned* within thirty days *after such condemnation,* at the price approved by the President of the United States, it shall, at the expiration of such period of thirty days, make application to the supreme court of the District of Columbia, by petition, at a general or special term, for an assessment of the value of such land as it has been unable to purchase.

Said petition shall contain a particular description of the property selected and condemned, with the name of the owner or owners thereof, if known, and their residences, as far as the same may be ascertained, together with a copy of the recorded map of the park; and the said court is hereby authorized and required, upon such application, without delay, to notify the owners and occupants of the land, if known, by personal service, and if unknown, by service by publication, and to ascertain and assess the value of the land so selected and condemned, by appointing three competent and disinterested commissioners to appraise the value or values thereof, and to return the appraisement to the court; and when the value or values of such land are thus ascertained, and the President of

the United States shall decide the same to be reasonable, said value or values shall be paid to the owner or owners, and the United States shall be deemed to have a valid title to said land; and if in any case the owner or owners of any portion of said land shall refuse or neglect, after the appraisement of the cash value of said lands and improvements, to demand or receive the same from said court, upon depositing the appraised value in said court to the credit of such owner or owners, respectively, the fee simple shall in like manner be vested in the United States.

Sec. 4. That said court may direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce any order or issue any process for giving possession.

Sec. 5. That no delay in making an assessment of compensation, or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property, or any part thereof, or as to the interests of the respective owners. In such cases the court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute. In all cases as soon as the said commission shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the court, possession of the property may be taken. All proceedings hereunder shall be in the name of the United States of America and managed by the commission.

Sec. 6. That the commission having ascertained the cost of the land, including expenses, shall assess such proportion of such cost and expenses upon the lands, lots, and blocks situated in the District of Columbia specially benefited by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefits resulting to such real estate.

If said commission shall find that the real estate in said District directly benefited by reason of the location of the park is not benefited to the full extent of the estimated cost and expenses, then they shall assess each tract or parcel of land specially benefited to the extent of such benefits as they shall deem

the said real estate specially benefited. The commission shall give at least day days' notice, in one daily newspaper published in the city of Washington, of the time and place of their meeting for the purpose of making such assessment and may adjourn from time to time till the same be completed. In making the assessment the real estate benefited shall be assessed by the description as appears of record in the District on the day of the first meeting; but no error in description shall vitiate the assessment: *Provided,* That the premises are described with substantial accuracy. The commission shall estimate the value of the different parcels of real estate benefited as aforesaid and the amount assessed against each tract or parcel, and enter all in an assessment book. All persons interested may appear and be heard. When the assessment shall be completed it shall be signed by the commission, or a majority (which majority shall hav e power always to act), and be filed in the office of the clerk of the supreme court of the District of Columbia. The commission shall apply to the court for a confirmation of said assessment, giving at least ten days's notice of the time thereof by publication in one daily newspaper published in the city of Washington, which notice shall state in general terms the subject and the object of the application.

The said court shall have power, after said notice shall have been duly given, to hear and and determine all matters connected with said assessment; and may revise, correct, amend, and confirm said assessment, in whole or in part, or order a new assessment in whole or in part, with or without further notice or on such notice as it shall prescribe; but no order for a new assessment in part, or any partial adverse action, shall hinder or delay confirmation of the residue, or collection of the assessment thereon. Confirmation of any part of the assessment shall make the same a lien on the real estate assessed.

The assessment, when confirmed, shall be divided into four equal installments, and may be paid by any party interested in full or in one, two, three, and four years, on or before which times all shall be payable, with six per centum annual interest on all deferred payments. All payments shall be made to the

Treasurer of the United States, who shall keep the account as a separate fund. The orders of the court shall be conclusive evidence of the regularity of all previous proceedings necessary to the validity thereof, and of all matters recited in said orders. The clerk of said court shall keep a record of all proceedings in regard to said assessment and confirmation. The commission shall furnish the said clerk with a duplicate of its assessment book, and in both shall be entered any change made or ordered by the court as to any real estate. Such book filed with the clerk when completed and certified shall be prima facie evidence of all facts recited therein. In case assessments are not paid as aforesaid the book of assessments certified by the clerk of the court shall be delivered to the officer charged by law with the duty of collecting delinquent taxes in the District of Columbia, who shall proceed to collect the same as delinquent real estate taxes are collected. No sale for any installment of assessment shall discharge the real estate from any subsequent installment; and proceedings for subsequent installments shall be as if no default had been made in prior ones.

All money so collected may be paid by the Treasurer on the order of the commission to any persons entitled thereto as compensation for land or services. Such order on the Treasurer shall be signed by a majority of the commission and shall specify fully the purpose for which it is drawn. If the proceeds of assessment exceed the cost of the park the excess shall be used in its improvement, under the direction of the officers named in section eight, if such excess shall not exceed the amount of ten thousand dollars. If it shall exceed that amount that part above ten thousand dollars shall be refunded ratably. Public officers performing any duty hereunder shall be allowed such fees and compensation as they would be entitled to in like cases of collecting taxes. The civilian members of the commission shall be allowed ten dollars per day each for each day of actual service. Deeds made to purchasers at sales for delinquent assessments hereunder shall be prima facie evidence of the right of the purchaser, and any one claiming under him, that the real estate was subject to assessment and directly benefited, and that the assessment was regularly made; that the assessment was not paid; that due advertisement had been made;

that the grantee in the deed was the purchaser or assignee of the purchaser, and that the sale was conducted legally.

Any judgment for the sale of any real estate for unpaid assessment shall be conclusive evidence of its regularity and validity in all collateral proceedings except when the assessment was actually paid, and the judgment shall estop all persons from raising any objection thereto, or to any sale or deed based thereon, which existed at the date of its rendition, and could have been presented as a defense to the application for such judgment.

To pay the expenses of inquiry, survey, assessment, cost of lands taken, and all other necessary expenses incidental thereto, the sum of one million two hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated: *Provided,* That one-half of said sum of one million two hundred thousand dollars, or so much thereof as may be expended, shall be reimbursed to the Treasury of the United States out of the revenues of the District of Columbia, in four equal annual installments, with interest at the rate of three per centum per annum upon the deferred payments: *And provided further,* That one-half of the sum which shall be annually appropriated and expended for the maintenance and improvement of said lands as a public park shall be charged against and paid out of the revenues of the District of Columbia, in the manner now provided by law in respect to other appropriations for the District of Columbia, and the other half shall be appropriated out of the Treasury of the United States.

Sec. 7. That the public park authorized and established by this act shall be under the joint control of the Commissioners of the District of Columbia and the Chief of Engineers of the United States Army, whose duty it shall be, as soon as practicable, to lay out and prepare roadways and bridle paths, to be used for driving and for horseback riding, respectively, and footways for pedestrians; and whose duty it shall also be to make and publish such regulations as they deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury or spoliation of all timber, animals, or curiosities within said park, and their retention in their natural condition, as nearly as possible.

[Emphasis added.]

Approved, September 27, 1890

APPENDIX E

43 U.S.C.A. § 421 Acquisition of lands for irrigation project; eminent domain

Where, in carrying out the provisions of sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491 and 498 of this title, it becomes necessary to acquire any rights or property, the Secretary of the Interior is authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under such sections, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice. June 17, 1902, c. 1093, § 7, 32 Stat. 389.

APPPENDIX F

40 U.S.C § 257. Condemnation of realty for sites and other uses

In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

Aug. 1, 1888, c. 728, § 1, 25 Stat. 357; June 25, 1948, c. 646, § 6, 62 Stat. 986.

APPENDIX G

Act of April 24, 1888, 25 Stat. 94, CHAP. 194 — An act to facilitate the prosecution of works projected for the improvement of rivers and harbors.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the *acquirement by condemnation* of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; *such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: Provided, however,* That when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of War, shall be reasonable, he may purchase the same at such price without further delay: *And provided further,* That the Secretary of War is hereby authorized to accept donations of lands or materials required for the maintenance or prosecution of such works.

Approved, April 24, 1888.

APPENDIX H
INDIAN LANDS—RIGHTS-OF-WAY ACROSS

For text of Act see p. 16

House Report No. 739, June 30, 1947
[To accompany H.R. 3322]
Senate Report No. 823, Jan. 14, 1948
[To accompany H.R. 3322]

The Senate Report repeats in substance the contents of the House Report, and contains a more detailed analysis of the legislation

Senate Report No. 823

The Committee on Public Lands, to whom was referred the bill (H.R. 3322) to facilitate rights-of-way through Indian lands, having considered same, report thereon with the recommendation that it do pass with the following amendment:

Strike out all after the enacting clause and insert the following:

That the Secretary of the Interior be, and he is hereby, empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

Sec. 2. No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), as amended; the Act of May 1, 1936 (49 Stat. 1250); or the Act of June 26, 1936 (49 Stat. 1967), shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devicees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

Sec. 3. No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

Sec. 4. This Act shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935 (49 Stat. 838), nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed hereby.

Sec. 5. Rights-of-way for the use of the United States may be granted under this Act upon application by the department or agency having jurisdiction over the activity for which the right-of-way is to be used.

Sec. 6. The Secretary of the Interior is hereby authorized to prescribe any necessary regulations for the purpose of administering the provisions of this Act.

Sec. 7. This Act shall not become operative until thirty days after its approval.

This bill has been considered by the Committee on Public Lands of the House; on June 30, 1947, that committee submitted its report (H. Rept. No. 739) to the House, recommending its passage, and on July 7, 1947, it passed the House.

On April 11, 1947, an identical bill (S. 1095) was introduced in the Senate which was referred to your committee for consideration.

Subsequent to the receipt by your committee of H.R. 3320, and prior to the time that your committee had an opportunity to give consideration to H.R. 3322, the Secretary of the Interior, under the date of July 10, 1947 submitted his report on S. 1095, suggesting that there is a real need for additional legislation relating not only to the right-of-way on Osage Indian lands but also to the rights-of-way on Indian lands of all reservations and recommended that the text of S. 1095 (which text is identical with the text of H.R. 3320) be stricken and that the text of a substitute draft be inserted in its stead, which text of the said substitute draft is identical with the amendment recommendation herein. Also under date of July 22, 1947, the Secretary of the Interior transmitted a communication to the President of the Senate urging the enactment of legislation relating to rights-of-way on Indian lands of all reservations, who referred the same to your committee for consideration, which proposed legislation was submitted in form of a proposed bill, which is identical with the text of the amendment recommended herein.

It is the judgment of your committee that there is a real need for additional legislation relating to rights-of-way on Indian lands of all reservations; therefore your committee recommends that this bill, as amended, be enacted.

A full explanation of the purposes of this proposed legislation is contained in House Report 739; the Secretary of the Interior's report on S. 1095, dated July 10, 1947; and the Secretary of the Interior's letter to the President of the Senate dated July 22, 1947, copies of which are appended hereto and made a part of this report, as follows:

[H. Rept. No. 739, 80th Cong., 1st sess.]

The Committee on Public Lands, to whom was referred the bill (H.R. 3322) to facilitate rights-of-way through restricted Osage Indian land, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill, as amended, do pass.

Department of the Interior
Washington 25, D.C., July 10, 1947.

Hon. Hugh Butler,
Chairman, Committee on Public Lands,
United States Senate.

My Dear Senator Butler: Further reference is made to your request for a report on S. 1095, a bill to facilitate rights-of-way through restricted Osage Indian land, and for other purposes.

I am in accord with the primary purpose sought to be accomplished by the bill. As a matter of fact, there is real need for additional legislation relating not only to the rights-of-way on Osage lands but also to the rights-of-way on Indian lands of all reservations. I recommend, therefore, that all of the text of S. 1095 be stricken and that the text of the enclosed substitute draft be inserted in its stead. If this is done, the title of the bill should also be changed to conform to the substitute draft.

This proposed substitute draft has already been submitted to the Bureau of the Budget with a draft of a proposed report, copy of which is also attached and which is self-explanatory. The comments of the Bureau of the Budget have not yet been received, and therefore no commitment can be made concerning the relationship of the proposed legislation and the accompanying report thereon to the program of the President.

Sincerely yours,

Oscar L. Chapman
Under Secretary of the Interior.

The amendment is as follows:

Page 1, line 4, strike out the comma following the word "easements" and insert in lieu thereof "upon just compensation, and".

EXPLANATION OF THE BILL

The purpose of this bill is to simplify the granting of rights-of-way across certain Osage Indian lands in Oklahoma.

The present procedure whereby an easement deed must be executed by the owner of the land on which a right-of-way is desired creates an excessive amount of work for the Osage Indian Agency, causes additional expense for the tribe, retards the processing of applications for rights-of-way, delays the time when the Indians are finally compensated for such rights-of-way, and leads to considerable dissatisfaction on the part of both applicants and Indians.

This legislation was introduced at the request of the tribes concerned through their tribal council. It would not apply to those Indians having certificates of competency or those over whose property the Secretary of the Interior does not now have jurisdiction. At hearings held on this bill, representatives of the Bureau of Indian Affairs, Department of the Interior, requested its passage.

The Committee on Public Lands unanimously recommends enactment of H.R. 3322.

Department of the Interior,
Washington, July 22, 1947.

Hon. Arthur H. Vandenberg,
President pro tempore of the Senate.

My Dear Senator Vandenberg: There is transmitted a proposed bill to empower the Secretary of the Interior to grant rights-of-way for any purpose over individually and tribally owned Indian lands.

For the reasons hereinafter stated, I strongly urge enactment of the proposed legislation.

It will go a long way to satisfy the need for simplification and uniformity in the administration of Indian law. At the present time the authority of the Secretary of the Interior to grant rights-of-way is contained in many acts of Congress, dating as far back as 1875. Thus, each application for a right-of-way over Indian land must be painstakingly scrutinized in order to make certain that the right-of-way sought falls within a category specified in some existing statute, which may limit the type of right-of-way that may be granted, or the character of the land across which it may be granted.

For example, the acts of February 15, 1901 (31 Stat. 790), and March 4, 1911 (36 Stat. 1253), which authorize the granting of transmission line rights-of-way, are limited in their application to "reservations of the United States," which have been held to include only those individual Indian allotments within the original boundaries of Indian reservations which were not extinguished by cession to the United States. These acts are also inapplicable to individual Indian allotments on the public domain. There would seem to be no persuasive reason for maintaining such artificial distinctions.

When it is discovered that an application for a right-of-way may not be granted under existing statutory authority, which is often the case, the right must then be obtained by means of easement deeds executed by the Indian owners and approved by the Secretary of the Interior. Very often as many as 15 to 20 individual Indians own undivided interests in 1 parcel of land and the signatures of all owners must be obtained. As a general rule these owners are widely scattered and frequently one or more of them are deceased and their heirs have not been determined. Thus, years may elapse before all of the owners' signatures can be obtained. As a practical matter, the burden of obtaining signatures to easement deeds falls on this Department and becomes a time and money consuming operation. In a great many cases the value and amount of land required for a right-of-way is very little and the cost to the United States in time and money is very high.

The proposed legislation would vest in the Secretary of the Interior authority to grant rights-of-way of any nature over the Indian lands described in the bill. The bill preserves the powers of those Indian tribes organized under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984); the act of May 1, 1936 (49 Stat. 1250), extending certain provisions of that act to Alaska; and the Oklahoma Welfare Act of June 26, 1936 (49 Stat. 1967), with reference to the disposition of tribal land. It permits the Secretary to grant rights-of-way over individually owned Indian lands without the consent of the owners thereof in four specified classes of cases where a requirement that the consent of all parties in interest be obtained would operate, from a practical standpoint, to the disadvantage of the Indians.

In order to avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new, provision has also been made in section 4 of the bill to preserve the existing statutory authority relating to rights-of-way over Indian lands.

Section 5 of the bill broadens existing powers of condemnation over individually owned Indian lands.

The Bureau of the Budget has advised me that there is no objection to the presentation of this proposed legislation to the Congress.

Sincerely yours,

Oscar L. Chapman,
Under Secretary of the Interior.

Amend the title so as to read:

A bill to empower the Secretary of the Interior to grant rights-of-way for various purposes across lands of individual Indians or Indian tribes, communities, bands, or nations.

APPENDIX I

STATUTES

Alaska Statute 29.68.240

Unification of local governments authorized. An organized borough and all cities within the borough may unite to form a single unit of home rule local government by complying with this chapter. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.250

Unification to be proposed by petition. (a) formation of a charter commission to propose a unification charter shall be proposed by resolution of the assembly or by petition. An assembly resolution for the purpose may be adopted not more often than once every 12 months.

(b) The borough assembly, a city council or a person living within the area of proposed unification may initiate the petition. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.260

Petition requirements. (a) The petition shall read:

"PETITION FOR ELECTION OF CHARTER COMMISSION TO PROPOSE UNIFICATION CHARTER

We, the undersigned, qualified voters of the Borough do hereby petition that the following proposition be placed before the voters as provided by law:

'Shall a charter commission be formed (and charter commission members be elected as elsewhere provided on this ballot) to prepare, adopt and submit to the voters for their approval or rejection a proposed charter uniting the Borough and all cities within it as a single unit of home rule government having the powers, duties and functions of a unified government as authorized by law?

Yes [ ] No [ ]

Signature	Address	Inside First Class or Home Rule City	Outside First Class or Home Rule City"

(b) The petition shall be signed by at least:

(1) That number of qualified voters of the borough living outside all first class and home rule cities in the borough equal to 25 per cent of the qualified voters who voted in the last regular borough election; and

(2) That number of qualified voters residing in each first class and home rule city located in the borough equal to 25 per cent of the qualified voters who voted in the last regular borough election in each city. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.270

Review of petition. Upon recepit of a petition, the borough assembly shall review the petition within 15 days after its receipt to determine whether it complies with § 260 of this chapter. If the petition does not meet the designated requirements, it shall be immediately returned to the person who initiated the petition with a statement indicating which requirements have not been satisfied. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.280

Call for charter commission nominations. Once it is determined by the borough assembly that a petition meets the requirements of § 260 of this chapter, or the assembly by its resolution proposes an election on formation of a charter commission to propose a unification charter, the assembly shall issue a call for the nomination of charter commission candidates, specifying the filing deadline and outlining the procedure described by making nominations under § 290 of this chapter. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.290

Nomination of charter commission candidates. (a) Charter commission candidates shall be nominated by petition signed by at least 50 qualified voters of the area from which the candidate seeks election or by a number of qualified voters from that area equal to at least 10 per cent of the number of votes cast from that area in the last regular borough election, whichever is less.

(b) Nomination petitions shall be filed with the borough clerk on or before the date fixed by the borough assembly, which date shall not be less than 30 days after notice of the call for nominations has been given through the borough. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.300

Qualifications of charter commission candidates. A person is eligible to be nominated as a candidate for the charter commission if he has been a qualified voter of the area from which he seeks election for at least one year immediately preceding the date his nomination petition is filed with the borough clerk. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.310

Composition of charter commission. The charter commission members shall be qualified voters and shall consist of 11 members, three of whom shall be residents elected at large from the area of the borough and eight of whom shall be (1) residents of and elected from the area outside cities in the borough or (2) residents of and elected from a city or cities in the borough. The number representing each of these areas shall be proportionate to the respective population as determined by the Department of Community and Regional Affairs. (§ 2 ch 118 SLA 1972; am § 9 ch 200 SLA 1972)

Alaska Statute 29.68.320

Election. (a) After receipt of a valid petition or adoption of an assembly resolution for the purpose, the borough assembly

shall submit to the voters the question of whether that borough and all cities within it shall unite to form a single unit of home rule government. The vote shall be held at the next regular borough election scheduled at least 90 days after receipt of the valid petition or adoption of the resolution.

(b) The ballot on the question of unification shall be worded exactly as in § 260(a) of this chapter.

(c) The election of charter commission members shall take place at the same time as the election on the question of unification.

(d) All costs incurred in conducting an election under this chapter shall be paid by the borough. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.330

Requirements for approval of unification and election of charter commission. (a) The votes on unification shall be tabulated in two separate classifications. One classification shall consist of all votes cast in the first class and home rule cities of the borough. The other classification shall consist of all votes cast in the remaining areas of the borough. In order for unification to be approved, it is necessary that a majority of the votes in each classification favor unification.

(b) If unification is approved, those charter commission candidates who received the highest number of votes from their respective areas shall serve as members of the commission. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.340

Charter commission organization and procedure. (a) The charter commission authorized by this chapter shall hold its first meeting within 30 days of the date of certification of its election. The commission shall elect from among its members a chairman and a deputy chairman.

(b) A majority of the total membership of the charter commission constitutes a quorum. No decision of the commission is valid or binding unless approved by that number of members necessary to constitute a quorum.

(c) The charter commission may elect other offices from among its membership, adopt rules governing its procedures and hire and discharge commission employees. Rules adopted must conform with the provisions of this chapter.

(d) Meetings of the charter commission shall be open to the public at all times. A journal of commission proceedings shall be kept and shall be available for public inspection at the borough offices.

(e) Except as provided in § 390(e) of this chapter, vacancies on the charter commission shall be filled by a majority vote of the commission. The person appointed to fill a vacancy must be a qualified voter of the same area as the person whom he succeeds and must have been a qualified voter of that area for at least one year immediately preceding the date of his appointment.

(f) The borough assembly may grant a per diem allowance to the commission members and may reimburse the members for travel expenses incurred in carrying out the duties prescribed by this chapter.

(g) Costs, fees, and other expenses incurred by the charter commission are a debt of the borough and shall be paid upon proper verification. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.350

Charter preparation. (a) A charter commission established under this chapter shall prepare, adopt and submit a proposed home rule charter for the area to be unified to the voters for approval or rejection at a regular or special borough election called by the borough assembly held within 60 days of the date of publication and posting of the proposed charter as required in § 380 of this chapter. The charter shall include among its provisions.

(1) provisions for adjustment of existing bonded indebtedness and other obligations in a manner which will reserve a fair and equitable burden of taxation for debt service, subject to § 410 of this chapter;

(2) Provisions for the establishment of

(A) service areas;

(B) sections, if desired; and

(C) reapportionment of the sections, if established;

(3) provisions for nonpartisan government and provision for the selection, organization, authority and responsibilities of the governing body and its executive and administrator;

(4) the transfer or other disposition of property and other rights, claims, assets and franchises of the local government to be unified under the charter;

(5) provision for exercise of the rights of initiative and referendum as required by A.S. 29.13.050;

(6) a method of amending the charter;

(7) the date on which the charter, if approved at the charter election required by § 390 of this chapter, is effective;

(8) designation of the new municipality's official name, subject to the provisions of (b) of this section;

(9) other charter provisions which the charter commission elects to include and which may be included in a home rule charter under this chapter and the state constitution.

(b) The area to be unified shall be known as a borough or a city or by some other designation consistent with existing law. (§ 2 ch 118 SLA 1972; am § 6 ch 147 SLA 1972)

Alaska Statute 29.68.360

Public hearings. Both before and after drafting the proposed charter, the charter commission shall hold a public hearing in each area of the borough represented on the borough assembly. Other public hearings may be held by the charter commission whenever and wherever it believes necessary and appropriate. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.370

Filing of proposed charter. Upon the adoption of a proposed home rule charter by the charter commission, the charter shall be signed by at least a majority of the total membership of the commission and shall be filed with the borough clerk. A copy with signatures affixed shall also be filed with the clerk of each city within the borough. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.380

Publication and posting of proposed charter. Within 10 days after filing the proposed charter, the borough clerk shall have it published once in at least one newspaper having general circulation distributed within the borough, if there is a newspaper having general circulation distributed within the borough. In addition, the clerk shall have a copy of the proposed charter posted in at least three public places within each city of the borough and each area outside cities. Copies of the proposed charter shall be made available by the borough assembly to the public at both the office of the borough clerk and the office of the clerk of each city within the borough. The clerk shall publish notice by radio and television of the publication, posting and availability of the proposed charter in a manner intended to apprise the entire borough population of the existence of the proposed charter. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.390

Election on charter. (a) The proposed charter adopted by the charter commission shall be submitted to the voters for ratification or rejection at the borough election specified in § 350 of this chapter. The borough clerk shall prepare the ballots for use in the election and shall give published notice of and otherwise conduct the election in the manner in which regular municipal elections are conducted. In addition, the clerk shall publish notice of the election by radio and television in a manner intended to apprise the entire borough population of the election.

(b) A person who is a qualified voter of the borough may vote in the election on the proposed charter.

(c) If a majority of the votes cast in the area of the borough outside all first class and home rule cities and a majority of the votes cast in the remaining area of the borough, composed of all first class and home rule cities, are cast in favor of the proposed charter, the charter is ratified. If the charter is ratified, two copies of the charter shall be filed with each of the following authorities:

(1) lieutenant governor;

(2) commissioner of the Department of Community and Regional Affairs;

(3) district recorder for the area of the borough;

(4) clerk of the borough;

(5) clerk of each city in the borough.

(d) If a proposed charter is rejected, the charter commission shall prepare, adopt and submit a proposed charter to the voters at a general or special borough election called by the borough and held within one year of the date of the first charter election. If the second proposed charter is also rejected, the charter commission shall be dissolved and the question of unification shall be treated as if it had never been proposed or approved.

(e) If after the rejection of the first proposed charter, more than one-half of the charter commission members resign from the commission, the borough assembly shall appoint new members to fill the vacancies in accordance with § 110(e) of this chapter. (§ 2 ch 118 SLA 1972; am § 9 ch 200 SLA 1972)

Alaska Statute 29.68.400

Effect of the charter after ratification. Upon ratification, the charter of a unified municipality organized under §§ 240-440 of this chapter operates to dissolve all local governments within the area of unification in accordance with the charter. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.410

Assets and liabilities. A municipality created by unification shall succeed to all the assets and liabilities of the local governments it unified. A bonded indebtedness or other debt incurred before unification shall remain the tax obligation of the area which contracted the debt, except that the tax obligation may be spread over a larger area by ordinance if the governing body determines that the asset for which the bonded indebtedness or other debt was incurred was used for the benefit of the larger area before unification, or is so used after unification. However, preunification bonded indebtedness or other debt for sewage collection systems, water distribution systems, and streets, even if determined to be used for the benefit of a larger area than that which incurred the debt, shall remain the tax obligation of the area which incurred the debt. (§2 ch 118 SLA 1972)

Alaska Statute 29.68.420

Ordinances. Within two years after ratification of the charter, the governing body of the unified municipality shall revise, repeal or reaffirm all borough and city ordinances, resolutions and orders in force within the borough at the time of unification. Each ordinance, resolution, regulation or order in force at the time of unification shall remain in force until superseded by action of the new governing body. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.430

Right to state and federal funds preserved. All provisions of law authorizing contributions of any kind, in money or otherwise, from the state or federal government to boroughs and cities shall remain in full force and effect with respect to a unified municipality organized under §§ 240-440 of this chapter. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.440

Powers of a unified municipality. A municipality organized under §§ 240-440 of this chapter shall have all powers:

(1) not prohibited it by law or charter;

(2) granted to organized Boroughs and first class cities. (§ 2 ch 118 SLA 1972)

APPENDIX J

Anchorage Charter § 19.08

Existing Rights and Liabilities Preserved. (a) Except as otherwise provided in this Charter, all rights, title, actions, suits, franchises, contracts and liabilities and all civil, criminal or administrative proceedings shall continue unaffected by the ratification of this Charter. The new government shall be the legal successor to the former governments for this purpose.

(b) Any bond of a former government authorized and unissued on the date of ratification or authorized at the elections provided in Section 19.02 remains authorized and may be issued at the discretion of the Assembly without additional ratification and subject to the procedure provided by law.

Anchorage Charter § 19.09

Prior Organizations Continued. (a) All existing special assessment districts, service areas, Boards of Supervisors for service areas, community councils and community schools recognized under municipal ordinances, and municipal regulatory and advisory boards and commissions shall continue to function until altered in accordance with this Charter.

(b) Upon ratification of this Charter the former cities shall become service areas for the provision of services formerly provided within their boundaries.

APPENDIX K

Act of February 8, 1887, 24 Stat. 388 CHAP. 119. — An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided,* That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further,* That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein pro-

vided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: And provided further, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided,* That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, *shall make settlement* upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such *settlement* is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appointed, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as

herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And provided further,* That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided however,* That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further,* That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation

shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such

citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

SEC. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, not to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

SEC. 10. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Approved, February 8, 1887.

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1693

UNITED STATES OF AMERICA, *Petitioner,*

v.

GLEN M. CLARKE, et al., *Respondents.*

On Writ of Certiorari from the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF BERTHA MAE TABBYTITE

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REPLY BRIEF OF BERTHA MAE TABBYTITE

ARGUMENT

I

This Case Does Not Involve The Right Of Indian Allottees Or The United States To Bring Inverse Condemnation Suits

Echoing the court of appeals (see Pet. App. at 4a), Anchorage argues at some length that Indians may, at times, be benefitted by the inverse condemnation remedy and that "Indians who have been allotted lands in severalty should [not] be denied a constitutional cause of action in the nature of inverse condemnation which

is afforded to all other American citizens." Anchorage Br. 23. Anchorage concedes that Section 357 "should be construed to favor the Indian allottee" but contends that this objective is achieved "by affirming his right to a cause of action in the nature of inverse condemnation if the laws of the state in question so allow." *Id.* 27.[1]

Anchorage and the court of appeals misconceive the nature of this case as well as the position of Tabbytite and the United States. This is not a landowner's suit for just compensation. Hence, the "right" of an allottee to bring such an action either under the Constitution or otherwise is not at issue. Rather, the question presented, as stated in the Petition for a Writ of Certiorari, is whether Section 357 "authorizes a state or local government to condemn allotted Indian trust

[1] To illustrate its point, Anchorage relies on Albers v. County of Los Angeles, 62 Cal.2d 250, 398 P.2d 129 (1965), in which a landowner was awarded just compensation for damages resulting from a landslide that was unforseeably caused by the state's construction of a road on nearby land. Anchorage asserts that Indian allottees would be denied compensation in these and similar circumstances involving inadvertent takings if the government's position is upheld. Anchorage Br. 26.

The factual situation presented in *Albers* obviously is not the typical exercise of the power of eminent domain. It is certainly a far cry from the far more common direct, physical invasion of property that is here involved. It is somewhat incongruous for Anchorage to rely so heavily on inadvertent takings to justify a blatant seizure. But even assuming the correctness of its argument (but *see* note 2 *infra*), Anchorage is asking the Court to interpret the statute in a manner that favors Indians in aberrant circumstances but is contrary to the allottees' best interests in the vast preponderance of real life situations. That would be an odd and unique way of applying the canon that ambiguous statutes must be construed in the Indians' favor.

lands by physical occupation." Pet. 2.[2] The position of Tabbytite and the United States (as we understand it) is that Section 357 does not *compel* the Indian allottee or the United States to bring an inverse condemnation action *to the exclusion* of an action for ejectment and damages, and therefore state or local governments are not authorized to condemn or acquire allotted lands by seizure. Whether state or local gov-

[2] Anchorage does not explain how a construction of Section 357 that: (1) determines compensation by reference to the date of physical occupation; (2) deprives Indians of their pre-existing right to ejectment and trespass damages; and (3) permits the taking of Indian compensable property rights by governments without prior notice or an opportunity to be heard, is in their best interests. *See* Pet. 15-18; Tabbytite Br. 30-36. Its only response to the considerable administrative and other burdens imposed on Indian allottees and the United States by the lower courts' application of Section 357 is to contend that they are not matters of record. Anchorage Br. 46-47.

Anchorage's argument is predicated on two unarticulated premises: that the taking of property by physical seizure and a landowner's suit to recover just compensation are identical and inseparable, and that, under the government's theory of Section 357, the United States and the Indian allottees would be remediless when allottees' property rights are inadvertently infringed. Neither assumption withstands analysis. Section 357 can be construed to require state and local governments to initiate judicial condemnation proceedings, at least where there has been an obvious invasion of compensable property rights (*see* Tabbytite's Br. 33), while the United States and Indian allottees would still have the right to pursue the inverse condemnation remedy in unusual situations where it might be advantageous. Indeed, Section 357 could hardly be construed to deny a cause of action that is implicit in the Constitution. *See* Tabbytite Br. 33. As to the second assumption, if allotted lands cannot be taken or acquired by physical occupation, Indian allottees and the United States would retain their common law rights to restoration and/or damages, *see, e.g.*, Blake Construction Co., Inc. v. United States, 218 Ct.Cl. ——, 585 F.2d 998 (1978); and Gladin v. Von Engeln, 575 P.2d 418 (Colo. 1978), and would also be able to invoke their constitutional right (independent of Section 357) to just compensation.

ernmental trespasses may ripen into takings by the filing of inverse condemnation suits is a different question which need not be addressed.

II

Contemporaneous Usage Does Not Support Anchorage's Position

In its Brief (11-12), which Tabbytite adopted (Br. 7), the United States cites a number of decisions to show that at the turn of the century, when Section 357 was enacted, the term "condemned" was generally understood to involve a judicial proceeding initiated by the would-be condemnor. In response, Anchorage argues that contemporaneous decisions indicate that the term "condemnation" or "condemnation under judicial process" was understood to authorize acquisition of property by physical seizure. Anchorage places principal reliance on Section 7 of the 1902 Reclamation Act, 43 U.S.C. 421,[3] as construed in *United States* v. *Buffalo Pitts Co.;* 234 U.S. 228 (1913); and *State of California* v. *Rank,* 293 F.2d 340, 354-55 (9th Cir.), *affirmed* in *Dugan* v. *Rank,* 372 U.S. 609, 619 (1963). Anchorage Br. 30-34. Although there are persuasive reasons for holding that the acquisition of Indian property pursuant to Section 357 requires the initiation of a judicial condemnation proceeding even if Anchorage were correct about contemporary usage,[4]

[3] Section 7 of the 1902 Act authorizes the Secretary of the Interior to acquire property "by purchase or by condemnation under judicial process."

[4] Resorting to contemporary usage to establish legislative intent shows that Section 357 is "admittedly ambiguous" and therefore calls for application of the canon that doubtful expressions must be construed in favor of the Indians. Bryan v. Itasca County, 426 U.S. 373, 392 (1976). *See* Tabbytite Br. 11; and notes 1 and 2 *supra.*

Section 357 also involves a waiver of sovereign immunity. Minnesota v. United States, 305 U.S. 382, 388-89 (1939). Construing the statute as imposing on the United States the considerable burden of expense of discovering all "takings" by physical seizure on millions of acres of scattered Indian allotments goes well beyond the far more limited waiver found in *Minnesota, supra.* Therefore, in keeping with the principle that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed," United States v. King, 395 U.S. 1, 4 (1969), Section 357 should be construed so as to place the onus of initiating legal action on the condemnor rather than the United States.

close analysis of Anchorage's authorities shows that the United States has the better of the argument.

Buffalo Pitts did not involve the taking of property by physical seizure or the exercise of the power of eminent domain. In carrying out its responsibilities under the Reclamation Act, the United States took an assignment of an engine that was being used by a government contractor. The issue in the case was whether the United States had assumed an obligation to pay the chattel mortgage on the engine after the contractor defaulted on his debt and the government took possession. The right of the United States to take possession of the engine under its contract was not in dispute. 234 U.S. at 233-34 and 235. The mortagee sued for compensation, not for possession. When compensation is sought, the fact and the legitimacy of the taking are conceded. *Great Falls Manufacturing Co.* v. *Garland,* 124 U.S. 581 (1888).[5]

[5] The other cases cited by Anchorage are not even near the mark. In Shoemaker v. United States, 147 U.S. 282 (1893), the statute whose constitutionality was challenged (on grounds unrelated to inverse condemnation) expressly provided that the court "may direct the time and manner in which the possession

It is true that *Buffalo Pitts* was cited by the court of appeals in *State of California* v. *Rank, supra,* 293 F.2d at 355, for the proposition that the United States is authorized by Section 7 of the Reclamation Act to effect a taking by physical seizure. But that was only part of its reasoning; the court of appeals also relied on the "less restrictive language" in a subsequent 1937 statute which authorized the acquisition of property "by proceedings in eminent domain, or otherwise." 293 F.2d at 355. Significantly however, in affirming the court of appeals this Court made no mention of *Buffalo Pitts* and relied solely on the "less restrictive" 1937 statute. *Dugan* v. *Rank, supra,* 372 U.S. at 619.[6]

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of the property condemned shall be taken or delivered, and may, if necessary, enforce any order or issue any process for giving possession." 147 U.S. at 285-86. Thus, by its very terms that Act proscribed takings by seizure. Great Falls Manufacturing Co. v. Garland, 124 U.S. 581 (1888), held that by suing for compensation in the Court of Claims, the plaintiff had assented to the taking of his property and had waived its right to object to the loss of possession. 124 U.S. at 597-600. By contrast, the authorities cited by the United States (Br. 11-12) involve ejectment actions or suits to compel the initiation of condemnation actions. It is only in the ejectment context that the authority of the potential condemnor to occupy the property is drawn into question.

[6] There is an indication that this Court disapproved the reasoning of the court of appeals predicated on *Buffalo Pitts* and the 1902 Reclamation Act. This Court stated (372 U.S. at 619, with emphasis added):

> The Court of Appeals correctly held that the United States was empowered to acquire the water rights of respondents by physical seizure. *As early as 1937*, by the Rivers and Harbors Act, 50 Stat. 844, 850, the Congress had provided that the Secretary of the Interior "may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes . . . .

The words "[a]s early as 1937," imply that the government was not empowered to accomplish a taking by physical seizure by the language of the 1920 Act.

Dugan v. *Rank, supra,* therefore at least implicitly supports the government's position that a turn of the century statute authorizing only condemnation does not permit takings by physical seizure.

III

Whether Acquisition Of Highway Rights Of Way Across Allotted Indian Lands Requires The Approval Of The Secretary Of The Interior Should Be Considered And Resolved In This Case

Anchorage has joined issue with Tabbytite regarding the relationship between Section 357 and the statutes, Sections 311 and 323 *et seq.*, that authorize the Secretary of the Interior to grant highway rights of way across allotted Indian lands. Tabbytite argues (Br. 9-29) that Sections 311 and 323 *et seq.* are the exclusive means of obtaining such rights of way, while Anchorage contends (Br. 48-61) that condemnation or seizure pursuant to Section 357 provides an alternative mechanism for acquiring the same interests.

Anchorage specifically notes its agreement with Tabbytite's argument (Br. 14-17) that prior administrative practice and construction are not of much assistance in resolving this issue of statutory construction. Anchorage Br. 51. This is significant because *United States* v. *Minnesota,* 113 F.2d 770 (8th Cir. 1940), the leading case holding that rights of way across allotted lands can be acquired through condemnation as well as by secretarial grant,[7] is expressly predicated on what Anchorage acknowledges is an er-

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[7] Subsequent lower decisions uncritically follow *Minnesota. See, e.g.,* Nicodemus v. Washington Power Co., 264 F.2d 614, 618 (9th Cir. 1959); United States v. Oklahoma Gas & Electric Co., 127 F.2d 349, 354 (10th Cir. 1942), *affirmed on other grounds,* 318 U.S. 206 (1943).

roneous view of prior administrative practice. *See* 113 F.2d at 773-74; and Tabbytite Br. 17-18 n.9. This makes it all the more necessary for this Court to resolve the issue left open in *Minnesota* v. *United States,* 305 U.S. 382, 391 (1939).[8]

Although the general rule is that this Court will not consider issues that were not raised before the lower courts, it is not inflexibly applied. *Youakim* v. *Miller,* 425 U.S. 231, 234 (1976). In recent years this Court has decided several important and recurring questions of public concern to which no exceptions were taken, which, unlike the situation here, were not fairly encompassed within the Petition for Certiorari, and which were not presented or briefed by the parties either in this Court or the lower courts. *See, e.g., Connor* v. *Finch,* 431 U.S. 407, 421 n.19 (1977); *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363, 368 n.3 (1977); *Fry* v. *United States,* 421 U.S. 542, 545 n.5 (1975); *Schlesinger* v. *Councilman,* 420 U.S. 738, 743-44 (1975); *Blonder-Tongue Laboratories* v. *University Foundation,* 402 U.S. 313, 319-20 and n.6 (1971); *Allen* v. *State Board of Elections,* 393 U.S. 544, 554 (1969); and *United States* v. *Western P. R. Co.,* 352 U.S. 59, 63 (1956).

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[8] Although Anchorage responds to Tabbytite's statutory argument in considerable detail, it does not address her contention that Sections 311, 323 *et seq.* and 357 should be construed in a manner that effectuates the current congressional policies manifested in the 1934 Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, and the 1948 Indian Right of Way Act, 25 U.S.C. 323 *et seq.* rather than the turn of the century allotment policies which have now been repudiated. Tabbytite Br. 24-29. *See also* the Indian Self-Determination Act of 1974, 25 U.S.C. 450 and 450a; and the Act of September 17, 1976, 90 Stat. 1275.

One of the principal reasons for the general presumption against deciding issues that were not raised below is to insure that this Court exercises its appellate jurisdiction only after the issues have been fully briefed as well as refined and analyzed by lower courts. *See Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 37 (1976); *Estelle* v. *Williams,* 425 U.S. 501, 508 n.3 (1976); and *United States* v. *Atkinson,* 297 U.S. 157, 159 (1936). These considerations are satisfied here. The lower courts have been heard from and the issue has been fully briefed.

Other factors that have been cited by this Court also counsel in favor of resolving the issue here and now. This case arose in the federal courts, *Blonder-Tongue, supra,* and the question is one of federal law which this Court left open 40 years ago. There are no disputed facts. *Allen, supra.* Tabbytite's argument would almost certainly have been rejected by the lower courts in view of the existing Ninth Circuit precedent. Tabbytite Br. at 29-30. For this reason alone, this "case is at most only marginally subject to the rule that this Court will not consider issues 'not pressed or passed upon below.'" *Youakim, supra,* 425 U.S. at 235. Deciding the issue now will promote the interests of judicial economy. Tabbytite Br. 30; *Allen, supra.* Consideration of the statutory issue may obviate the need to decide a constitutional question. Tabbytite's Brief 36-37; *Fry, supra.* It is also jurisdictional because if Tabbytite is correct, the district court would lack jurisdiction to condemn the right of way even if a judicial proceeding is initiated. *Compare Schlesinger, supra.* And like the issue decided in *Western P. R. Co., supra,* this case also involves the maintenance of a proper relationship between the courts and an admin-

istrative agency in a matter of continuing concern to the general public as well as to Indian allottees.[9]

IV

Injunctive Relief Is Appropriate

Anchorage argues (Br. 20-22) that injunctive relief is not appropriate because a taking by seizure has occurred and the United States and Tabbytite have an adequate remedy at law, an inverse condemnation suit to recover just compensation. Principal reliance is placed in *Hurley* v. *Kincaid,* 285 U.S. 95 (1932).

Insofar as Anchorage's argument assumes that a valid taking has occurred under Section 357, it begs the crucial question.[10] Tabbytite and the United States

[9] If this Court decides that highway rights of way across allotted lands cannot be obtained pursuant to Section 357, it should then consider whether that decision should be given only prospective effect. If the decision were applied retroactively, highway rights of way obtained by condemnation pursuant to Section 357 could be declared trespasses. The factors to be considered are clearly spelled out in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971). Applying these criteria, Tabbytite submits that a decision upholding her statutory argument should not be applied retroactively. Of course, the new rule would apply to this controversy since neither Anchorage nor any of its predecessors has obtained a condemnation judgment pursuant to Section 357 and they have continuously been on notice of this suit and of Tabbytite's objections to the road across her land. Pet. App. 12a-13a and 15a.

Quite apart from the retroactivity issue, a condemnation judgment awarding a right of way across allotted lands in which the United States appeared in behalf of the allottee would be entitled to res judicata effect. Durfee v. Duke, 375 U.S. 106 (1963); Heckman v. United States, 224 U.S. 413 (1912).

[10] Anchorage's argument on this point presupposes that highway rights of way can be acquired by judicial condemnation pursuant to Section 357. Anchorage apparently recognizes that an injunction would be proper if, as Tabbytite contends, secretarial approval of the right of way is required.

contend that Anchorage's occupation of Tabbytite's allotment is illegal and unauthorized and that her property has not been taken.

Insofar as Anchorage suggests that injunctive relief should be denied even if the seizure of Tabbytite's land is illegal, its contention is contrary to a long and consistent line of precedents. *See, e.g., United States* v. *Lee,* 106 U.S. 196 (1882); *Hooe* v. *United States,* 218 U.S. 322, 335-36 (1910); *Lane* v. *Pueblo of Santa Rosa,* 249 U.S. 110 (1919); *United States* v. *North American Transportation & Trading Co.,* 253 U.S. 330, 333 (1920); *United States* v. *Goltra,* 312 U.S. 203, 208 (1941); *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579, 584-85 (1952); and *Dugan* v. *Rank,* 372 U.S. 609, 619-23 (1963).[11]

[11] *Hurley* is also distinguishable on its facts. The taking, if any, that was involved was inadvertent and only incidental to the government's project. The government acted in the good faith belief that protected property rights had not been infringed. 285 U.S. at 102-103. The plaintiff complained only about the failure to pay just compensation in advance of the alleged taking (285 U.S. at 104); hence there was no consideration of procedural due process concerns. And in cases arising under Section 357, the lands to be condemned are not private grants. Allotments are set apart "for a recognized public purpose,—that of safeguarding and advancing a dependent Indian people dwelling within the United States." Alaska Pacific Fisheries v. United States, 248 U.S. 78, 88 (1918). *Accord:* United States v. Rickert, 188 U.S. 432, 437 (1903). Thus, in contrast to *Hurley,* takings of allotted Indian lands always involve competing public uses and conflicting public policies. While permitting the seizure of allotted lands without prior notice or compensation definitely interferes with national Indian policies, requiring would-be condemnors to initiate judicial proceedings in obvious taking situations simply enforces minimum procedural due process safeguards. Tabbytite Br. 31-33.

In circumstances like those involved in *Hurley* and Dugan v. Rank, *supra,* large government projects could be stopped in their tracks if possible inadvertent infringements of compensable prop-

On this point, this case is analogous to *Dugan* v. *Rank, supra*. There, an injunction was refused on the grounds that the appropriate remedy was a suit for just compensation but only after it was determined that government officials were authorized to take private property by physical seizure. If seizure had not been authorized, the invasion of the plaintiffs' water rights would have been enjoined as an unauthorized trespass rather than as a partial taking. 372 U.S. at 620-23. *See also Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 695 and 701-02 (1949); *Santa Fe P. R. Co.* v. *Fall*, 259 U.S. 197, 199 (1922); and *Payne* v. *Central P. R. Co.*, 255 U.S. 228, 238 (1921).

In accordance with the procedure followed in *Dugan*, the Court must first determine whether takings of allotted Indian lands by physical seizure are authorized by Section 357. If the position of Tabbytite and the United States is upheld, the individuals and entities responsible for the seizure of Tabbytite's property would be acting in violation of the supreme law of the land. In such circumstances, injunctive relief is entirely appropriate. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 193-95 (1978); *Dugan* v. *Rank, supra*. Indeed, refusing to issue an injunction after finding (or assuming) that physical seizures are not authorized by Section 357 would validate unlawful conduct and permit the acquisition of Indian property rights without the requisite federal consent, *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 667-71 (1974); 25

erty rights gave rise to injunctive relief. In this case, it is the government's administration of twelve million acres of allotted Indian lands that would be made much more difficult if flagrant physical seizures are sanctioned. Brief for United States 16-23.

U.S.C. 177, and without observance of procedures required by law. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Smith* v. *McCullough*, 270 U.S. 456, 463-65 (1926); *Bunch* v. *Cole*, 263 U.S. 250 (1923).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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